IN THE SUPREME COURT

OF THE UNITED STATES

NO. 76-6767

FRANK R. SCOTT AND BERNIS L. THURMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

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INTRODUCTION

Petitioners Scott and Thurmon respectfully request the Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia to review that court's judgment affirming their convictions for conspiracy to sell narcotic drugs in violation of 26 U.S.C. §§4705(a and 7237(b) (Thurmon) and possession of narcotic drugs in violation of 26 U.S.C. §4704 (Scott) and its interlocutory decisions reversing the trial judge's orders suppressing evidence obtained pursuant to wiretaps.

OPINIONS BELOW

Prior to trial, District Judge Waddy entered an order suppressing wiretap evidence for failure to minimize interception of non-crime related telephone calls. The opinion is reported at 331 F. Supp. 233 (D.D.C. 1971) and attached as Appendix A. The Government's appeal from that order resulted in a reversal and remand to Judge Waddy to consider additional evidence in light of the standards announced in United States vs. James, 161 U.S. App. D.C. 88, 494 F.2nd 1007 (1974). The court of appeals' first remand opinion, which we will refer to as Scott I, is reported at 164 U.S. App. D.C. 125, 504 F.2nd 194 (1974) and attached as Appendix B.

On remand, Judge Waddy filed a new order finding facts, reaching conclusions of law and again suppressing the wiretap evidence. That order is unreported and is attached as Appendix C. The court of appeals' opinion reversing Judge Waddy a second time, which we will refer to as Scott II, is reported at 170 U. S. App. D.C. 158, 516 F.2nd 751 (1975) and attached as Appendix D. A timely suggestion for rehearing en banc resulted in its denial with four judges voting to grant rehearing en banc. Their statement, by Judge Robinson, is reported at 173 U.S. App. D.C. 118, 522 F.2nd 1333 (1976) and is attached as Appendix E.

On the same date, Judges Wright, Robinson and Merhige filed a memorandum affirming in the related case of United States vs. Walker, 173 U.S. App. D.C. 129, 522 F.2nd 1344 (1976) expressing the view that 18 U.S.C. §2518(5) was violated in this case and Walker. That memorandum is attached as Appendix F.

A petition for a writ of certiorari to review the Scott II decision was denied at 425 U.S. 917, with Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Powell dissenting. The order and dissenting opinion are attached as Appendix G.

After this Court's denial of certiorari, the case returned to the district court and, after speedy trial dismissal motions were denied, resulted in the conviction of petitioners and a third defendant, Chloe Daviage.[1/] No opinion was filed. The court of appeals' opinion affirming the convictions of Petitioners and Daviage, sub nom United States vs. Daviage, is unreported and attached as Appendix H.

JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari under 28 U.S.C. §1254(1). The court of appeals' judgment was entered March 29, 1977, and Petitioners' timely application resulted in Mr. Chief Justice Burger's entering an order on April 21, 1977 extending to May 28, 1977 the time for filing this petition.

1/ Daviage's petition for a writ of certiorari has already been filed and bears No. 76-6637.

QUESTIONS PRESENTED

I. (a) Whether the conduct of federal narcotics agents, in executing wiretaps under a court order which required minimization pursuant to 18 U.S.C. §2518(5), may, consistent with the deterrent basis of the exclusionary rule, retroactively be determined reasonable by a court, despite the fact that at the time of the interceptions the agents admittedly made no good faith efforts to determine whether minimization of the wiretap intrusion was feasible, willfully failed to attempt minimization, and instead intercepted each and every call.

(b) Whether, in view of a bad faith violation of wiretap minimization requirements, exclusion of only those conversations which are of a non-incriminating nature is consistent with the deterrent basis of the exclusionary rule and with Congressional intent in enacting the statutory suppression remedy to Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

II. Whether federal agents executing a wiretap authorization violate the Fourth Amendment rights of persons whose communications they intercept, when they intercept all calls on the authorized line despite the fact that they did not have probable cause to believe that all calls contained evidence of criminal activity, did not assert that they had such probable cause to the judge, and were not authorized to so intercept by the judge.

III Whether criminal defendants whose trial was delayed for six years, four months and twenty-two days from date of arrest were denied a speedy trial, in violation of the Sixth Amendment to the United States Constitution, when the bulk of the time elapsed between arrest and trial was due to unnecessary delay in processing and deciding Government interlocutory appeals from wiretap suppression orders and the defendants could not have had an earlier trial except by waiving their highly colorable challenges to the wiretaps.

PROVISIONS OF LAW INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §2518(5):

(5) . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. §2518(10) (a):

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted in insufficient on its face; or

(iii) the interception was not made in conformity with the order authorization or approval.

STATEMENT OF THE CASE

In the course of an investigation of what was believed to be a substantial narcotics operation[2/], the Government on January 24, 1970, applied to District Judge Smith for an order to wiretap telephone number 483-2948, registered to Geneva Jenkins and located in a residence at #603, 1425 N Street, Northwest, Washington, D.C. The Government's affidavit alleged probable cause to believe that Alphonso H. Lee, Thurmon, and others were committing narcotics offenses, and were using telephone number 483-2948 in connection with such offenses, and that information concerning the offenses would be obtained through a wiretap of the communications over that telephone. The order also contained the provision required by 18 U.S.C. §2518(5) that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter". Subsequently, the Government applied for and received similar authorization for two other wiretaps, on telephones located at the residence of Alphonso Lee.

The agents conducting the wiretaps listened to and recorded each and every call over the telephones; the agent in charge of the interception testified that they made no attempt to minimize the interception, even though they knew of the minimization requirement of the court order and the statute. The agents themselves classified the intercepted calls as only 40% narcotic related with the remaining 60% as non-narcotic related calls.

On February 24, 1970, the wiretaps were terminated and arrest and search warrants were issued. Several persons, including petitioners, were arrested and a quantity of narcotics were seized. Indictments were not filed until June 24, 1970, when two multi-count indictments were filed charging Scott, Thurmon and others with drug offenses. District Judge Waddy held hearings in April, 1971 on several pre-trial motions including one to suppress all wiretap evidence on the ground that the monitoring agents failed to minimize the instrusion as required by the order of the court and by statute. On April 29, 1971 Judge Waddy granted the motion to suppress for lack of minimization, stating that the agents in charge of the interceptions "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it."

The Government after unsuccessfully moving for reconsideration based on a "call analysis", appealed on July 23, 1971. The court of appeals did not hear agrument until December 13, 1972 - almost one and a half years later - and then decided to hold decision in abeyance until its decision in the then-pending case of United States vs. James, 494 F.2nd 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), which also presented the minimization issue to that court. After its decision in James, in which it adopted the language of United States vs. Tortorello, 480 F.2nd 764, 784 (2nd Cir. 1973), cert denied, 414 U.S. 866 (1973), that minimization was satisfied if agents made good faith efforts to minimize and if those efforts were reasonable, the court of appeals remanded Scott I to Judge Waddy on June 27, 1974 with instructions to accept any evidence which would be of assistance in assessing the reasonableness of the agents' conduct in light of James, including, if the District Court was convinced of its validity, the call analysis prepared by Government attorneys.

On remand Judge Waddy held further hearings on the minimization issue and the reasonableness of the agents' conduct. Judge Waddy rejected the call analysis as an after-the-fact attempt to validate the interceptions and in conflict with what the agents thought at the time of the interceptions.

Viewing the totality of the agents' conduct, Judge Waddy found a "knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements" and, on

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2/ Judge Waddy found that the intercept revealed an operation of lesser dimension than originally anticipated.

November 8, 1974 again ordered all wiretap evidence suppressed.

The Government appealed. A panel of the court of appeals consisting of Judges MacKinnon, Wilkey and District Judge Jameson reversed on July 25, 1975, concluding that the search and seizure was not unreasonable since, by looking at the intercepted conversations, it could not discover any categories of calls which could not have been reasonably intercepted had minimization been instituted. The court rejected the argument that such retroactive validation is contrary to Fourth Amendment law by finding that rule inapplicable to minimization requirements of a wiretapping statute.

Since the agents were not required to institute minimization procedures, the court found that their bad faith in not doing so was irrelevant, stating that the "agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable."

The Court of Appeals did not have to reach the question of the extent of suppression required to cure a violation of minization requirements because it found none, but added that, even if it found a violation of minimization requirements, total suppression probably would not be required, since Congressional intent was to allow use of all evidence of an incriminating nature. "The nonincriminating evidence could be suppressed," but any evidence falling under the wiretap order or under §2517(5) would be admissible. The only remedy available against the illegal conduct of the agents would be a civil suit under §2520.

Petitioners' petition for rehearing with suggestion for en banc consideration was denied by the Court of Appeals. Judge Robinson filed a statement joined in by Chief Judge Bazelon and Judge Wright and Leventhal expressing their views as to why full court consideration should have been granted (App. E)[3/].

3/ See also, Memorandum, United States vs. Walker, App. F.

Petitioners filed a timely petition for a writ of certiorari to this Court, but after a delay in receiving the Government's opposition this Court denied certiorari on April 5, 1977, with three members of the Court dissenting. Appendix G.

After the mandate returned to the district court, petitioners moved to dismiss on speedy trial grounds. Judge Waddy held hearings on July 6, 1977 and denied the motions, finding that Scott and Thurmon had timely asserted their rights but that they had not been prejudiced by the delay.

On July 15, 1977, Scott, Thurmon and Daviage waived trial by jury and went to trial on a stipulation based on the wiretap evidence and its fruits. There was no defense evidence. Judge Waddy found Scott guilty on count 13 of the Scott indictment (Cr. No. 1088-70) and Thurmon guilty on count 1 of the Thurmon indictment (Cr. No. 1089-70) and, thereafter, sentenced both to ten years imprisonment.

Scott and Thurmon appealed to the court of appeals, preserving their minimization claims and raising, for the first time in that court, the speedy trial claim. A panel of the court of appeals affirmed, concluding that, as in Barker vs. Wingo, 407 U.S. 514 (1972), there was absence of prejudice and freedom from incarceration and "something less than vigorous assertion by appellants of their speedy trial rights and the attribution of the most substantial part of the delay to the interlocutory appeals." Appendix H.

REASONS FOR GRANTING THE WRIT

I. WIRETAP ISSUES

We cannot improve on the reasons why certiorari should be granted set forth by Mr. Justice Brennan in his dissenting opinion, Appendix G, and those in Judge Robinson's statement for the four members of the court of appeals who sought rehearing en banc, Appendix E. We should note that the Government's primary ground for opposing the writ of certiorari when review was sought from the Scott II decision was that the case was at an

interlocutory stage and "review now by this Court is premature, since at trial petitioners may be acquitted, in which case their claims will be moot." Brief for the United States in opposition p.6-7, Scott, et al. vs. United States, No. 75-5688 (filed February 17, 1976).

Since its denial of certiorari in this case, the Court has considered only one wiretap case on the merits - United States vs. Donovan, 97 S.Ct. 658 (1977). Although not in point to the minimization issues raised here, that portion of the Court's Donovan opinion rejecting suppression suggests disagreement with that portion of the court of appeals' Scott II opinion rejecting total suppression, because it suggests suppression 18 U.S.C. §2518(10)(a)(i) when the violation involves a central provision of Title III protections such as the minimization requirement. 97 S.Ct. at 670-671.

II SPEEDY TRIAL ISSUES

The court of appeals' resolution of the speedy trial issues seems to turn on its view that the delays in resolving the Government interlocutory appeals were justified. The record belies this conclusion; even accepting the view that it was proper to wait after argument for the decision in United States vs. James, supra, the record demonstrates almost one and one half years between appeal and argument and an additional period of over one year due to slow processing by the Government, starting from the delay in indictment. The delay involved in Government interlocutory appeal has attracted substantial attention. See e.g., United States vs. Brown, 520 F.2nd 1106 (D.C. Cir. 1975); United States vs. Sarvis, 523 F.2nd 1177(1975); United States vs. Perry, 353 F. Supp. 1235 (D.D.C. 1973). This case presents an appropriate vehicle for the Court to consider whether delayed decisions must be counted against the Government for speedy trial purposes.

Moreover, the Court's conclusion that there was no timely assertion of speedy trial rights is improper. The only way Petitioners could have had a trial before April, 1976 was by waiving their right to assert their highly colorable claims under 18 U.S.C. §2518(5). The timely assertion portion of the Barker test cannot require futile motions to be filed or that colorable pre-trial suppression motions be withdrawn to preserve speedy trial rights.

CONCLUSION

The writ of certiorari should be granted.

Respectfully Submitted,

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached writ of certiorari was mailed to the Solicitor General, Department of Justice, Washington, D.C. on May 19th, 1977.

Michael E. Geltner

John A. Shorter, Esq.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6767

FRANK R. SCOTT AND BERNIE L. THURMON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 18, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

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April 29, 1971 Opinion of District Court Granting Petitioners' Motion to Suppress.

June 25, 1971 District Court's Denial of Government's Motion to Reconsider.

July 22, 1974 Opinion of United States Court of Appeals for the District of Columbia Reversing and Remanding.

November 12, 1974 Unpublished Opinion of District Court Granting Petitioners' Motion to Suppress.

July 25, 1975 Opinion of United States Court of Appeals for the District of Columbia Reversing and Remanding for Trial.

October 3, 1975 Denial of Petitioners' Motion for Rehearing *En Banc*.

April 5, 1976 Certiorari Denied.

July 15, 1976 Petitioners' Conviction in District Court.

March 29, 1977 Petitioners' Convictions Affirmed by United States Court of Appeals For the District of Columbia.

October 11, 1977 Certiorari Granted.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA

v.

FRANK RICARDO SCOTT et al.

UNITED STATES OF AMERICA

v.

BERNIS L. THURMON et al:

Crim. Nos. 1088-70, 1089-70.

April 29, 1971.

MEMORANDUM ON MOTIONS

WADDY, District Judge.

In criminal Case No. 1088-70 Frank Ricardo Scott, also known as "Reds," Albert Lee, also known as Alphonso H. Lee, Reginald Clifton Jackson, also known as "Zeke," Leroy Houston, also known as "Big Boy" and Teri A. Lee, were charged in an indictment with conspiring together "and with other persons known and unknown to the Grand Jury" to violate (1) Section 4705(a), Title 26, United States Code and (2) Section 174, Title 21, United States Code.

Defendant, Scott, was also charged in Counts 8 and 12 of the indictment with using a communication facility "* * * in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense"—an offense made punishable by 18 U.S.C., Section 1403. In Counts 13 and 14 he is charged with violations of Title 26 U.S.C., Section 4704(a), and in Counts 16 and 17 he is charged with violations of 21 U.S.C., Section 174.

Defendant, Albert Lee, was also charged in Counts 3 and 6 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code and conspiring to commit that offense." In Count 15 he is charged with a violation of Title 26 U.S.C., Section 4704

(a), and in Count 18 he is charged with a violation of Title 21 U.S.C., Section 174. Defendant, Albert Lee, is a fugitive.

Defendant, Jackson, was also charged in Counts 10 and 11 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

Defendant, Houston, was also charged in Counts 4 and 5 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Defendant, Houston, has entered a plea of "Guilty" to Count 4 and the Government has announced its intention to dismiss the remaining charges against him at the time of sentencing.

Defendant, Teri A. Lee, was also charged in Counts 7 and 9 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Teri A. Lee is a fugitive.

On the same day that the indictment was returned in Criminal No. 1088-70 another indictment was returned in Criminal Case No. 1089-70 in which Bernis Lee Thurman, also known as Benjamin Thornton, Geneva Jenkins, also known as Geneva Thornton, George Jenkins, Alfred D. Spencer, Bernard Smith, Johnny Duval Williams, also known as Duke, Costello V. Williams, Chloe V. Daviage, also known as Mickey, and Evelyn A. Abston were charged with conspiring together "and with other persons known and unknown to the Grand Jury" to violate (1) Section 4705(a), Title 26, United States Code, and (2) Section 174, Title 21, United States Code.

Defendant, Thurmon, was also charged in Counts 13 and 17 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense.

Defendant, Geneva Jenkins, was also charged in Counts 12 and 14 of the indictment with using a communication

facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

Defendant, George Jenkins, was also charged in Counts 3 and 4 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act or acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." In Count 20 he is charged with a violation of Title 26, United States Code, Section 4704(a), and in Count 23 he is charged with violating Title 21, United States Code, Section 174.

Defendant, Alfred D. Spencer, was also charged in Counts 6 and 16 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act or acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiracy to commit that offense."

Defendant, Bernard Smith, was also charged in Counts 11 and 15 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." He was charged in Count 21 with a violation of Title 26, United States Code, Section 4704(a) and in Count 24 with a violation of Title 21, United States Code, Section 174. This defendant has entered a plea of "Guilty" to an Information charging him with conspiracy to sell narcotics in violation of Title 26, United States Code, Section 4704(a), and the Government has announced its intention to dismiss the charges contained in the indictment at the time of sentencing.

The defendant, Johnny Duval Williams, was also charged in Counts 7 and 10 with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." He was charged in Count 22 jointly with Costello V. Williams with violating Section 4704(a), Title 26, United States Code, and in Count 25, jointly with Costello V. Williams, with a violation of Section 174, Title 21, United States Code. Johnny Duval

Williams has entered a plea of "Guilty" to the first count of the indictment charging him with conspiring to violate Section 4705(a), Title 26, United States Code, and the Government has announced its intention to dismiss the remaining charges of the indictment against him.

In addition to the two conspiracy counts and the charges made against her jointly with Johnny Duval Williams in Counts 22 and 25 mentioned above, the defendant, Costello V. Williams, was also charged in Counts 18 and 19 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Costello V. Williams has entered a plea of "Guilty" to Count 22 of the indictment and the Government has announced its intention to dismiss the remaining counts of the indictment applicable to this defendant.

The defendant, Daviage, was also charged in Counts 5 and 8 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

The defendant, Abston, was also charged in Count 9 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense. The defendant, Abston, has been severed from this case because of her illness and hospitalization.

Frank Ricardo Scott, Albert Lee and Leroy Houston, defendants in Criminal No. 1088-70 are named as co-conspirators in Count 1 of Criminal No. 1089-70 but not as defendants therein. Frank Ricardo Scott and Leroy Houston, are named as co-conspirators in Count 2 of Criminal No. 1089-70 but not as defendants therein.

Bernis Lee Thurmon, a defendant in Criminal No. 1089-70 is named as a co-conspirator in Count 1 of Criminal No. 1088-70 but not as a defendant therein. The same allegations are incorporated by reference in Count 2 of Criminal No. 1088-70.

Both of these indictments are the result of information obtained by the use of a wire tap on telephone number 483-2948 subscribed to by "Geneva Thornton," located at #603, 1425 N Street, Northwest, Washington, D. C., and alleged to have been commonly used by Bernis Lee Thurmon. The intercept was authorized pursuant to Section 2518, Title 18, United States Code, by U. S. District Judge John Lewis Smith on January 24, 1970.

The defendants in each case have filed or joined in similar pre-trial motions and the Government has filed a motion to consolidate the two cases for trial. All motions in both cases were heard in a joint proceeding acquiesced in by all parties and submitted to the Court for its determination.

1. CONSTITUTIONALITY OF THE STATUTE

All defendants have attacked the constitutionality of the statute authorizing the interception. Their primary argument is that the statute contravenes the 4th Amendment restrictions against unreasonable searches and seizures.

The motions before the Court challenge the validity of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, particularly Section 2518, Title 18, United States Code, which establishes the procedure for the interception of wire and oral communications.

As already indicated the Fourth Amendment to the Constitution of the United States provides the constitutional framework within which to test the validity of the statute. This amendment dictates that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that this right "shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." The amendment does not bar all searches and seizures but only those that are unreasonable. The amendment outlawed the "general warrant," and its basic purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930. Thus the issue confronting this Court is whether 18 U.S.C. § 2518 is so broad as to result in the authorization for a general warrant permitting an unreasonable search and seizure in violation of the 4th Amendment.

The United States Supreme Court faced a similar problem in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). There it held the New York permissive eavesdrop statute, N.Y.Code Crim.Proc. § 813-a, to be unconstitutionally broad in its sweep "resulting in a trespassory intrusion into a constitutionally protected area" and thus violative of the 4th and 14th Amendments. The Court condemned the New York statute's "blanket grant of permission to eavesdrop • • • without adequate judicial supervision or protective procedures," 388 U.S. at 60, 87 S.Ct. at 1884 and reiterated the 4th Amendment requirement that a neutral and detached authority be interposed between the police and the public. It held that this authority must independently find probable cause, and that "warrants may only issue 'but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized'." 388 U.S. at 55, 87 S.Ct. at 1881.

In striking down the constitutionality of the New York Statute the Supreme Court delineated four basic 4th Amendment requirements of particularity that must be a part of any statute authorizing wiretapping or eavesdropping. These requirements are as follows:

1. The statute must provide that probable cause be established in the application and order for the belief that a *particular offense* has been or is being committed: a particular description of the *property* (conversations or communications) to be seized, and not merely the name or identity of the person whose conversations are to be seized.

2. The statute must require particularity as to the duration of the intrusion which shall not be so long as to be "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." The statute must provide for prompt execution of the order and for a new showing of probable cause upon each application for an extension of the original authorization.

3. The statute must require particularity as to the termination date once the particular conversation sought is seized, rather than leaving such cut-off date to the discretion of the officer.

4. The statute must provide for either notice to the persons whose conversations are to be seized or a showing of special facts or exigent circumstances necessitating the withholding of notice. The statute must also require a

return on the warrant in order to limit the discretion of the officer as to the use of the seized conversations which may be of innocent as well as guilty parties.

The requirement of a showing of probable cause before an independent judicial officer imposing the necessary safeguards was reiterated by the Supreme Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In that case the Supreme Court held that although the eavesdropping officers had exercised great restraint and limited their intrusion into the petitioner's privacy, the intrusion was nevertheless unlawful because it lacked the safeguards of judicial restraints independently imposed. It held that the agents should have been required "before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate." They should have been "compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order," and they should have been directed to notify the authorizing magistrate after completion of the search in detail of all that had been seized."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 represents an attempt by Congress, among other things, to structure a limited system of wire surveillance and electronic eavesdropping within the framework of the 4th Amendment and the guidelines of *Berger, Katz,* and other Supreme Court decisions for use by law enforcement officers in fighting crime. An examination of the portions of the statute relevant to these motions reveals that they track the constitutional requirements of particularity, judicial restraints and supervision, and the other protective procedures outlined by the Supreme Court in *Berger* and *Katz.*

The Statute vests control and supervision of its use in Judges of the U.S. District Court and the U.S. Court of Appeals. (See 18 U.S.C. §§ 2510(9) (a) and 2516(1)). Section 2518(1), Title 18, U.S. Code, requires that the application for a wiretap must contain certain information and be made to such judge who may require additional testimony or documentary evidence in support of the application, 2518(2), Title 18, U.S. Code. Section 2518(3) provides for an independent determination by the judge and

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or

approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

It is clear that these statutory provisions require that a neutral and detached authority be interposed between the police and the public and that authority is required to make certain specific findings of probable cause before authorizing the interception.

The first part of the *Berger* outline as to particularity is met by Section 2518(1) (b), Title 18, which requires that the *application* contain a "full and complete statement of the facts relied upon by the applicant to justify his belief that a [wiretap] order should be issued." That statement must include:

"(i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, [and] (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;".

Section 2518(4) similarly provides that the *order* shall specify:

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;".

It is thus apparent that the first requirement of *Berger* has been incorporated in the wire interception statute at issue.

The second part of the *Berger* outline is also sufficiently incorporated in the statute as can be seen by an analysis of the following sections:

(1) Section 2518(1) (d) requires the application to specify the period of time for which the intercept is required, as well as the facts necessary for the probable cause to believe that the intercept should not automatically terminate when the described type of communication is first intercepted;

(2) Section 2518(1) (f) requires upon an application for an extension a showing of what has resulted so far or an explanation of why there have been no results;

(3) Section 2518(4) (e) requires that the order specify the time period for which the intercept is authorized and whether it will automatically terminate when the described communication is first obtained; and

(4) Section 2518(5) requires that the authorization be no longer than necessary to achieve the objective and in no event longer than thirty (30) days. Extensions may only be granted upon a separate showing of probable cause for each extension. All orders and extension must be executed as soon as practicable.

The third part of the *Berger* outline is provided for in Sections 2518(1) (d), 4 (e), (5) and (6) which require the

order and application to set out (1) the time for which the intercept is authorized; (2) a maximum intercept period of thirty days; (3) a new showing of probable cause for each extension of the authorization order; and (4) a system for reporting on the results to the authorizing judge. All of the above tend to remove discretion from the officer executing the order.

The fourth and final part of the *Berger* outline is provided for in Section 2518(8) which requires the recording of all intercepted communications and the preservation of them under the directions of the authorizing judge as well as notice by that judge to the persons named in the order within a reasonable time after the termination of that order but not later than ninety (90) days thereafter.

[1] On the basis of the preceding analysis, it is the opinion of this Court that the constitutional requirements of particularity, judicial restraint and supervision, and protective procedures that were expounded by the Supreme Court in *Berger* and *Katz* were adequately provided for in 28 U.S.C. § 2518 and that said statute is, therefore, constitutional on its face. Accordingly, the motions of all defendants to suppress based upon the alleged unconstitutionality of the statute are denied.

2. SUFFICIENCY OF THE APPLICATION AND AFFIDAVIT

[2] Defendants seek to suppress the evidence in this case on the ground that the application and affidavit submitted to Judge Smith for the initial intercept order on January 24, 1970, were insufficient on their face to establish probable cause. Such a motion tests only the sufficiency of matters presented to the issuing authority. The testimony adduced and evidence received at the hearing of the motion cannot be used to augment an otherwise defective affidavit, but if matters are disclosed which discredit or impeach assertions in the affidavit they must be considered in determining whether probable cause in fact existed. Thus the wiretap order in this case must stand or fall on the contents of the application and affidavit in support thereof. United States v. Roth, 391 F.2d 507 (7th Cir., 1967).

The main thrust of defendants' argument is that the application fails to provide the information required by Section 2518(1) (b) and (c) which provide as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:"

• • •

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which the place where the communication is to be intercepted, (iii) a particular description of the type of communication sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous:".

With respect to subsection (b) (i) "details as to the particular offense that has been, is being, or is about to be committed," Paragraph 1 of Agent Cooper's affidavit alleges an investigation by the Bureau of Narcotics and Dangerous Drugs and the Metropolitan Police Department of "narcotic wholesale trafficking activities" of certain known and unknown persons in a "conspiracy." Paragraphs 5, 6, 7, 8, 9, 10 and 10a alleged particular facts of continuing narcotics offenses involving some of the alleged conspirators. The affidavit speaks of an employee of "Al," one of the alleged conspirators, as selling several hundred dollars worth of heroin per pay; of members of the Bureau of Narcotics and Dangerous Drugs and of the Metropolitan Police making undercover "buys" of narcotics at the Fantasy Restaurant, alleged to be owned by one of the conspirators. It details two surveilled purchases of "wholesale" quantities of heroin from members of the alleged conspiracy and another purchase of a large quantity of narcotics from Bernis Thurman. The affidavit described the delivery of a sufficient amount of "lactose" to Albert Lee's

home to cut pure heroin into 17,000 capsules for street sale; and details the widespread use of telephones by the participants to carry on the alleged conspiracy.

[3] The Court finds that the affidavit complies with the requirements of subparagraph (b) (i).

[4] With respect to sub-paragraph (b) (ii), the requirement of a particular description of the nature and location of the facilities to be intercepted is clearly satisfied by the following language of Paragraph 2 of Cooper's Affidavit:

> "This application is submitted for an Order authorizing the interception of wire communications at 1425 N Street, N. W., Apartment 603, Washington, D. C., telephone number 483-2948. The subscriber to number 483-2948 is listed as Geneva Thornton."

[5] The requirements of sub-paragraph (b) (iii), "a particular description of the type of communications sought to be intercepted," are satisfied by the following allegations of Paragraph 2 of Cooper's Affidavit:

> "The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia, and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area."

Sub-paragraph (b) (iv) requires a statement as to "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

Paragraph 1 of the affidavit names certain known alleged conspirators and states that others are unknown. Paragraph 3 also contains the names of certain alleged conspirators. Among the named alleged conspirators is "Bernis Lee Thurman, also known as Benjamin Thornton." Bernis Lee Thurman is described in Paragraph 3B:

> "He is 5' 11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W. Apt. 603. Thurman is known to the Metropolitan Police Department I.D. Bureau as #190647 and to the Federal Bureau of Investigation as #753 570D."

In Paragraph 8 Thurman is alleged to be "Al's" right

hand man and that he had been identified by the resident manager of 1425 N Street, N. W. "as the person she knows as Benjamin Thornton, who rents Apartment 603 at that address." "Al" was identified as Albert Lee, also known as Alfonso H. Lee, who lived at 5195 Linnean Terrace, Northwest, and who was described by an informant as one of the largest dealers of narcotics in the Washington, D. C. area. Similar information concerning Thurman is given in Paragraphs 10 and 10a of the affidavit. Thurman's close association with "Al" is also shown by the affidavit. This information was clearly sufficient to identify Thurman and to associate him with telephone No. 483-2948 upon which the wiretap was sought.

The Court finds that the affidavit sufficiently complies with the statute and that the particularizations and safeguards meet the constitutional standards required by *Berger, supra,* and *Katz, supra.*

We turn now to a consideration of whether the affidavit of Cooper, containing the particularizations mentioned above, was sufficient to establish probable cause for the wiretap order.

[6, 7] In considering the question of probable cause we must keep in mind that "the term 'probable cause' • • • means less than evidence which would justify condemnation," Locke v. United States, 7 Cranch 339, 348, 3 L.Ed 364, and that probable cause may be found "upon evidence which is not legally competent in a criminal trial." United States v. Ventresca, 380 U.S. 102, 107, 85 S.Ct. 741, 745, 13 L.Ed.2d 684, citing Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 3 L.Ed.2d 327. We also keep in mind that a neutral and detached magistrate (under this statute a Federal judge) must draw the inferences from such evidence. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. The magistrate cannot find probable cause upon the mere conclusions of the affiant but must have details of the underlying circumstances in the affidavit Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. Further, an affidavit for a search warrant may be based on hearsay information so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that any informant involved, whose identity need not be disclosed, was credible or his information reliable. Aquilar v. Texas,

supra. United States v. Long, 439 F.2d 628 (U.S.Ct. of App., D.C., decided Jan. 25, 1971).

We therefore find a two-pronged test that must be applied to Cooper's affidavit. The first is whether there is a showing of facts upon which the informant based his information, and the second is whether there is a showing of a basis which the affiant concluded that the informant was either credible or his information reliable.

The main informant relied upon for the information in the Cooper affidavit is SE 54, although others are mentioned. The affidavit relates some of the underlying circumstances upon which SE 54 based its information. It details that SE 54 was itself involved in the narcotics drug traffic; that it became an employee of "Al"; that while picking up its own narcotics it had personally observed numerous other packages of narcotics upon which were written the names of different persons; that "Al" had told it that he came to the District of Columbia area from New York and went into the illicit narcotics business; that "Al" had told it that he frequently went to New York and Virginia to engage in narcotics transactions; that it had observed the close relationship between "Al" and Bernis Lee Thurman and knew Thurman as "Al's" right hand man; that it had contacted a female named "Bernice" at the Fantasy Restaurant for the purpose of setting up a narcotics transaction with "Al"; that it has seen "Al" on more than one occasion carrying a bag containing more than 3 kilos of white powder which "Al" said was pure heroin; that it had called "Al's" telephone and arranged for the delivery of a wholesale quantity of heroin on two different occasions; that on or about January 12, 1970, it learned that Mrs. Teri A. Lee was temporarily managing "Al's" business and that it should make its order by calling 483-2948; that it called that number, spoke with Bernis Lee Thurman, ordered a large quantity of narcotics from Thurman, which narcotics were delivered to SE 54.

The above-mentioned circumstances, all of which plus others, are set out in the Cooper affidavit are clearly sufficient to satisfy the first prong of the test.

The second prong of the test is equally met by the affidavit. It states that SE 54's reliability had been proven in the past; i. e. on two occasions its information directly resulted in arrests of subjects for violations of the Harrison Narcotics Act; its information had been checked and

verified by members of the Metropolitan Police Department; a female by the name of "Bernice Davis" is the licensed manager of Fantasy; the two telephone calls SE 54 made to "Al" in which it ordered wholesale quantities of heroin were monitored by the police; the delivery of these orders were surveilled by police officers, one of which was made by a man whose identity was verified by the police as Bernis Lee Thurman, and the others by "Al" and Thurman. A review of the affidavit as a whole, together with the details mentioned above constitute an ample showing of a basis upon which the affiant concluded that the informant was credible and its information reliable.

It is obvious from the above that both requirements of the *Aquilar* test have been met. Defendants' arguments that probable cause was not shown because the affidavit alleges only one incident of the use of telephone No. 483-2948 in connection with a narcotics transaction and that that transaction was too remote because of the time lapse between the date of the transaction and the date of the affidavit ignore the remaining allegations of the affidavit and are unreasonably restrictive. Mr. Justice Rutlege, writing for the Court in Brinegar v. United States, 338 U.S. 160 at 175, 69 S.Ct. 1302 at 1310, 93 L.Ed. 1879 states:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

In United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, Mr. Justice Goldberg wrote:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.
>
> • • •"
>
> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause

exists without detailing any of the 'underlying circumstances' upon which that belief is based. See Aquilar v. Texas, *supra*. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, *where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause*, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States [362 U.S. 257], supra, at 270 (80 S.Ct. 725, 4 L.Ed.2d 697]." (emphasis added).

[8] The motions to suppress based upon the alleged insufficiency of the affidavits to support Judge Smith's determination of probable cause for the wiretap order are denied.

3. COMPLIANCE OF THE ORDER WITH THE STATUTE

This Court, having determined that 18 U.S.C., Section 2518 is constitutional and having also determined that Judge Smith had probable cause to issue the Intercept Order of January 24, 1970, must now decide whether that order complied with the requirements of the statute.

The determinations required by Section 2518(3) of Title 18 United States Code are set forth in the order of January 24, 1970, and, as heretofore pointed out, are amply supported by the factual circumstances showing probable cause.

The defendants claim, however, that the Intercept Order failed to comply with the requirements of the statute, particularly sub-sections 4(c), 4(e) and (5), and move that all evidence obtained as a result of the wiretap and all of the "fruits" of that interception be suppressed. Inasmuch as the requirements of sub-sections 4(a), (b) and (d) have not been challenged by the defendants the discussion will not deal with those sub-sections.

[9] I. The statute in sub-section 4(c) requires the Court

in its intercept order to specify "a particular description of the type of communications sought to be intercepted, and a statement of the particular offense to which it relates." It is the Government's contention that the order, if read as a whole, clearly so specifies. This Court agrees.

> Paragraph (a) of the Order states: "There is probable cause to believe that Alphonso H. Lee, • • • Bernis Lee Thurman, and others • • • are committing and are about to commit offenses set forth in section 2516 of Title 18, to wit: *the importation and transportation of narcotics in violation of section 174 of Title 21 of the United States Code*" (emphasis added).

This statement of a "particular offense" satisfies one of the requirements of sub-section 4(c).

Paragraph (b) of the Order continues with an additional finding that "[t]here is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications," and that "[i]n particular, those wire communications will concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and the illicit destination of these narcotic drugs in this jurisdiction." This finding satisfies the specific requirements of 4(c) that the order specify "the type of communication sought to be intercepted • • •."

The Order proceeds in paragraph (c) to state that "all normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining *the above information.*" (emphasis added). The "information" referred to in paragraph (c) relates to the type of communications detailed in paragraph (b) and thus again cautions the surveilling agent as to the type of communications to be intercepted.

Finally, paragraph (d) of the Order finds "probable cause to believe that the telephone facilities at 1425 N Street, Northwest, Washington, D. C., carrying the telephone number 483-2948 is being used or is about to be used in connection with the commission of the *above described offenses* • • •." (emphasis added). This statement is again a clear reference to the offenses described in paragraph (a) of the order.

It is thus apparent that the order under consideration,

if read in its entirety, as it must be, does comply with the statutory provisions of 18 U.S.C. 2518(4) (c) by particularly describing the "type of communications sought to be intercepted" and by stating "the particular offense to which it relates."

[10] II. Section 4(e) of the statute requires the order to state "whether or not the interception shall automatically terminate when the described communication has been first obtained." This requirement is complied with in the "ordering" portion of the order which provides in pertinent part that the interception "must terminate upon attainment of the *authorized objectives,* or, in any event at the end of thirty (30) days from date." (emphasis supplied). The "authorized objectives" referred to relate to the seizure of telephone communications concerning the importation and transportation of narcotics and the conspiracy referred to in paragraphs (a) and (b) of the order.

[11, 12] III. The intercept order clearly complies with 18 U.S.C. § 2518(5), which requires a specification of the time during which the interception is authorized, by providing in the "Ordering" clause that:

> "This authorization to intercept wire communications shall be executed as soon as practicable after signing of the Order and shall be conducted in such a way as to minimize the interception of communications that are [not][1] otherwise subject to interception under Chapter 119 of Title 18 of United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days[2] from date."

[1] There are two typographical errors in the Order which merit mentioning:

The word "[not]" was erroneously omitted from the Order. However, it was understood by the applicant and the agents that the interception was to be conducted so as to minimize the receipt of communications *not* otherwise subject to interception. If the surveilling agents disregarded the known intent of the Order the seizure would be illegal and the evidence seized subject to suppression. This issue is discussed in another section of this opinion.

[2] The order erroneously authorized a 30-day intercept while the application only requested a 20-day intercept. This was conceded to be a clerical error and an extension was applied for at the end of 19 days so no prejudice ensued because of the error.

It should also be noted that § 2518(3) gives the authorizing judge authority to modify a requested order. Thus Judge Smith could have extended the time period requested so long as it was still within the 30 day maximum period prescribed by the statute and did in fact extend the authorization for 11 days upon the expiration of 19 days.

Contrary to the contention of the defendants the statute does not require the Order to state *how* the agents are to minimize receipt of communications "not otherwise subject to interception"; nor does the 4th Amendment prescribe such a requirement. It is sufficient for the Order to state the requirement and direct the officer to carry out the mandate of that Order. Whether the surveilling agents in this case actually did conduct the intercept "in such a way as to minimize the interception of communications that are [not] otherwise subject to interception" is a separate question which will be discussed in another section of this memorandum.

IV. A basic requirement of 18 U.S.C. § 2518 is that a neutral and detached authority be interposed between the police and the public so as to comply with the 4th Amendment. The Order of January 24, 1970, in its final paragraph, allows for continued judicial supervision and control by that "neutral and detached authority" during the execution of the order by providing that:

> "Harold J. Sullivan shall provide the Court [Judge Smith] with a report detailing the progress of the interception and the nature of the communication intercepted on the 5th, 10th, 15th, 20th, and 25th day following the date of this Order."

It is concluded from the preceding analysis that all requirements of the statute, including 18 U.S.C. 2518(4) and (5) have been adequately incorporated in the Order of January 24, 1970 and it is thus the opinion of this Court that said order "tracks the statute" and is therefore valid.

4. COMPLIANCE WITH ORDER BY MONITORING OFFICERS

Having determined that the Order of January 24, 1970, complies with 18 U.S.C. § 2518 the Court must now consider and determine whether the surveilling agents complied with the requirements of that order.

The United States Supreme Court in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), was deeply concerned with the indiscriminate seizure of communications permitted by the New York permissive eavesdrop statute, New York Code Crim.Proc. § 813-a, and stated in this regard that:

"The statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations."

• • • • • •

"During such a long and continuous (24 hour a day) period the conversations of any and all persons coming into the area covered by the device will be seized *indiscriminately* and without regard to their connection with the crime under investigation." 388 U.S. at 59, 87 S.Ct. at 1883 (emphasis added).

To cure this deficiency in the N. Y. statute, 28 U.S.C. 2518 provided for numerous requirements that were prescribed by *Katz* and *Berger*. In light of these requirements it was the opinion of this Court that 28 U.S.C. 2518 "tracked" *Katz* and *Berger* and was thus constitutional. (See Part 1 of Opinion, supra).

As the Government has contended "Title III of the Omnibus Crime Control and Safe Street Act of 1968 was an attempt among other things to structure a *limited system of wire surveillance* and electronic eavesdropping for law enforcement use • • •." (Gov't's memorandum at p. 3). (emphasis added). One of the limiting provisions of the statute is found in 18 U.S.C. 2518(5) which provides in pertinent part that:

"Every order • • • shall contain a provision that the authorization to intercept • • • shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception • • •."

This mandate was clearly set forth in the "Wherefore" clause of the January 24, 1970 order. (See Part 3 of opinion, *supra*). As provided by statute (28 U.S.C. 2518(4)(c) the Order also attempted to describe with particularly the type of communications sought to be intercepted. (See Part 3 of opinion, *supra*). It was the opinion of this Court that these limiting provisions satisfied the requirements of §§ 4(c) and (5) of the statute and thus made the order valid.

It is unquestionable that the intent of the order was clearly expressed. Agent Cooper, the supervising agent, testified that he "understood the order to restrict [the intercept] to conversations relating to narcotics" and that he "relayed the instructions to the agents who would be manning the taps." (Transcript at pp. 305-06). Yet in spite

of the order's unequivocal mandate the record reflects that virtually *all* conversations were overheard and recorded (transcript at p. 355) and that approximately 60% of the calls intercepted were completely unrelated to narcotics. Neither of these facts standing alone is conclusive but together they strongly indicate the indiscriminate use of wire surveillance that was proscribed by *Katz* and *Berger*.

The Government contends that all conversations had to be monitored in order to determine whether or not they were narcotic related. However, the record clearly depicts certain communications that could not possibly involve drugs. For example, the intercept transcript at page 47 shows a call from Riggs National Bank to Thurman seeking to verify a signature on a check; at pages 148-150 shows a conversation between Geneva and another female about a possible job opening and Geneva's qualifications for it; and at page 280 a call to the Weather Bureau and the response. It is common knowledge that when one calls for a weather report he will get a tape recorded response. These are clear cases where the intercept should have been cut off. However, the intercept was not cut off. The surveilling agents did not even attempt "lip service compliance" with the provision of the order and statutory mandate but rather completely disregarded it. The record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls. In fact when Agent Cooper was asked if he could point to "any discretion exercised by any agent at any time that resulted in • • • non-recordation • • •" He answered "I cannot, sir." (Transcript at p. 319).

The record indicates approximately six conversations between Geneva Jenkins and her mother. While each conversation was intercepted in its entirety, there was never any indication that Geneva's mother was involved in the alleged conspiracy and none of the conversations were narcotic related. Geneva herself was mentioned in the affidavit only as the subscriber to telephone number 483-2948. This Court is willing to accept the proposition that it may be reasonable to monitor an entire conversation between two known conspirators even if that conversation turns out to be innocent. 28 U.S.C. § 2518(5) provides for this by demanding only that there be an attempt to "*minimize* the interception of communications not otherwise subject to interception • • •." (emphasis added). But there comes a time when an officer should reasonably assume that a par-

ticular conversation does not involve drugs. The conversations between Geneva and her mother serve as the most blatant examples of this. While there are other instances in which the Court feels that the tap should have been cut off, it will suffice to reiterate that virtually 100 per cent of all calls in each 24 hour day were monitored and that 60 per cent of the calls intercepted were not related to narcotics and not otherwise subject to interception. The Government itself has persuasively argued that an order should be read in its entirety and that "[i]*t is presumed, at the least, that the judge intended the whole of the order and every part of it to be significant and effective.*" (emphasis added). (Government's memo at 15). If this Court were to allow the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in *Berger* and *Katz* would be illusory.

The Government argues that the indiscriminate listening by the monitoring agents was in effect approved by Judge Smith because reports were made to him every five days during the period of the intercept and he did not require any change in the manner in which the interception was being conducted but, as a matter of fact, extended the authorization for an additional period. This Court has examined the 5-day reports to Judge Smith and notes that those reports do not reveal that the agents were failing to "minimize the interception of communications that [were not] otherwise subject to interception" as required by his order of January 24, 1970. In the main, they simply report the total number of communications recorded in each 24-hour period and the number of such calls that were narcotic related. Some of the reports included a summary of what was said in some of the narcotic related conversations and information gained relating to the authorized objective, but none of them revealed that the agents were listening to and recording in full and indiscriminately *all* conversations passing through the subject telephone.

[13] The Government argues also that in the investigation of an ongoing narcotics conspiracy such as is involved in this case, it is necessary to intercept and monitor from beginning to end all communications passing through the

tapped telephone because narcotics related transactions are conducted through code words that are peculiar to such transactions and conversations that may sound innocuous in the beginning may end up on a narcotic related subject employing such code words. This Court recognizes the difficulty that monitoring agents may have in manning wiretaps in cases of this kind. Nevertheless, that difficulty cannot authorize indiscriminate listening or permit such agents to totally disregard an order of the authorizing judge to conduct the interception "in such a way as to minimize the interception of communications that are not otherwise subject to interception."

[14] It is thus the opinion of this Court that the surveilling agents failed to comply with a central mandate of the Order of January 24, 1970—i.e. to "minimize the interception of communications not otherwise subject to interception"—and, therefore, the motions to suppress should be and are granted, and all intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, are suppressed.

This granting of this motion to suppress does not necessarily end the prosecution of this case. Under District of Columbia Code, Section 23-104, as amended by the District of Columbia Court Reform and Criminal Procedure Act of 1970, the United States may have an expedited appeal. The results of such appeal may provide guidance for this Court in any future proceedings in this case; for other judges who hereafter may be faced with similar problems and to enforcement officers in connection with future interceptions authorized pursuant to the statute for similar investigations.*

5. MOTIONS FOR PRODUCTION AND IDENTITY OF INFORMANT TO SUPPRESS PHYSICAL EVIDENCE, FOR SEVERANCE OF DEFENDANTS AND COUNTS, FOR LEAVE TO FILE SUPPLEMENTAL SEARCH WARRANT INVENTORY, AND TO CONSOLIDATE

The remaining motions not disposed of at the hearing or in this memorandum are disposed of as follows:

* If the Court of Appeals affirms the ruling of this Court, many weeks of trial may be averted.

Defendants' Motion For Production and Identity of the informant is denied. McCray v. Illinois, 386 U.S. 300, 311, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The granting of the motion to suppress for failure of the monitoring agents to comply with the order has the effect of disposing of the motions of the defendants to suppress the physical evidence obtained or seized as the result of the searches conducted in the execution of search warrants or incident to arrests in the prosecution of this case. All such motions are granted on the ground the warrants themselves were issued as a result of illegally obtained evidence and the evidence seized are "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct 266, 84 L.Ed. 307 (1939); Silverthorne v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

All motions for severance of counts and defendants are denied, no undue prejudice having been shown. Rules 14 and 8(b), Federal Rules of Criminal Procedure.

The motion of the United States for leave to file supplemental search warrant inventory is granted. Nordelli v. United States, 9th Cir., 24 F.2d 665; United States v. Greene, D.C., 141 F. Supp. 856.

The motion of the United States to consolidate Criminal Cases Nos. 1088-70 and 1089-70 is granted. Rule 13, Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

Washington, D.C.

Transcript of Hearing—Friday, June 25, 1971

The above-entitled cause came on for motion for reconsideration before THE HONORABLE JOSEPH C. WADDY, United States District Judge, commencing at 1:45 p.m.

[44] MR. KELLOGG: Nothing from the United States, Your Honor.

THE COURT: Very well.

THE COURT: The Court has considered the submission of the Government and the counter-submissions of the defendants on this motion to reconsider; and the Court agrees with counsel for the defendants that, apparently, the Government misses the point in its argument as to what this Court was doing.

There was an order which said that steps should be taken to minimize the interception of communications not otherwise subject to interception. There was uncontradicted evidence that was before this Court that no steps were taken to minimize the interception of communications that were not otherwise subject to interception.

The analysis that the Government now makes or attempts to make might have a more persuasive power if the evidence would show that the agents attempted to minimize the interception but ran into difficulty because of the nature of the case and, therefore, some of the messages and some of the communications were ambiguous and they continued to listen.

That is a different situation than where there has been an attempt to follow the order.

But here the evidence, as I say, is contradicted that absolutely no attempt was made to minimize the interception of communications not otherwise subject to interception.

[45] As to the question of standing, the Court agrees also with counsel for the defendants. And the Court take the position that in view of the fact that no attempt was made to minimize the interception of communications that should not have been intercepted that there was a pointblank viola-

tion of the order granted by Judge Smith; and that conversations seized from persons other than Miss Jenkins and Mr. Thurman are likewise suppressible as being fruits of a poisonous tree.

And the Court feels that this is in keeping with the holdings of Jones and Alderman (phonetically). In Alderman (phonetically) the Court says that "such violation would occur if the United States unlawfully overheard conversations of petitioner himself." And here were conversations of the defendants themselves.

And proceeding further in the same opinion, the Court says that "the Court has characteristically applied the same rules where unauthorized electronic surveillance is carried out by physical invasion of premises."

This much the dissent frankly concedes when it is talking about consent.

Then it proceeds, "Like physical evidence which might be seized, overheard conversations are fruit of an illegal entry and are inadmissible in evidence."

The motion of the Government to reconsider is denied.

[Thereupon, the above-entitled matter was concluded at 3:33 p.m.]

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UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

UNITED STATES of America,
Appellant,

v.

Frank R. SCOTT et al.

UNITED STATES of America,
Appellant,

v.

Bernis L. THURMON et al.
Nos. 71-1702, 71-1703.

Argued Dec. 13, 1972.

Decided June 27, 1974.

Before McGOWAN, MacKINNON and ROBB, Circuit Judges.

McGOWAN, Circuit Judge:

The Government appeals a District Court determination that (1) law enforcement officials conducting a judicially authorized wiretap failed to minimize, to the degree required by the statute, interceptions of non-narcotics-related conversations and (2) all evidence derived therefrom should be suppressed. United States v. Scott, 331 F.Supp. 233 (D.D.C. 1970). We deferred decision pending action by this court on another case involving common issues, including that of minimization. United States v. James, 161 U.S.App. D.C. 88, 494 F.2d 1007 (1974). We conclude that the standards for measuring minimizations employed by the District Court are at variance with those subsequently announced and thoroughly discussed in *James*. Accordingly, we remand for reconsideration in light of that opinion and the additional comments contained herein.

I

Pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, officials of the Federal Bureau of Narcotics and Dangerous Drugs and the Metropolitan Police Department applied for judicial authorization to intercept wire

communications of members of a narcotics conspiracy who were using a telephone listed to Geneva Jenkins.[1] The District Court granted authorization on January 24, 1970, empowering agents to intercept the "wire communications of Alphonso H. Lee, Burnis Lee Thurmon, and other persons as may make use of the facilities hereinbefore described," and commanding them to minimize interceptions of conversations not subject to interception under Title III.

On that same day the interception began. Officials subsequently sought and obtained authorization to intercept narcotics-related conversations conducted over two other telephone numbers,[2] and later obtained an extension of the original authorization.[3] On February 24, 1970, all of the interceptions terminated, and search and arrest warrants were executed that led to the arrest of twenty-two persons and the seizure of considerable quantities of narcotics.

Following indictment, another district judge ordered comprehensive discovery and thereafter conducted an extensive series of hearings on multiple defense motions. The court concluded that the agents conducting the interception of

[1] The application and judicial authorization identified the subscriber of the telephone number as Geneva Thornton. However, the District Court opinion indicates that the name Thornton was an alias, and that the subscriber's real name was Geneva Jenkins. She was indicted under that name. United States v. Scott, 331 F.Supp. 233, 236 (D.D.C.1970). In this opinion, we will refer to her as Geneva Jenkins, and to the telephone number on which the authorization was granted as the Jenkins telephone.

[2] The District Court's opinion in terms dealt only with the question of the agent's efforts to minimize unauthorized interceptions in the Jenkins wiretap. Its suppression order excluded all evidence derived from this initial interception, and "evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970." United States v. Scott, 331 F. Supp. 233, 248 (D.D.C.1970). While it appears that at least some information obtained from the Jenkins wiretap is reflected in the application and affidavit supporting the interceptions on the other telephone numbers, *see* JA at 28, 30–41, there was also a substantial amount of independent material contained in those documents. In these circumstances we are unable to say with certainty whether the District Court thought those taps to be fatally tainted by what it considered to be the invalid Jenkins tap. If on remand the District Court should persist in this view of the Jenkins tap, it will presumably be required to determine whether the other interceptions were tainted to an unacceptable degree by information obtained from that tap. *See* Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[3] Although the application for the initial interception requested authorization for a twenty day wiretap, the court order granted permission for thirty days. However, agents sought extension of the initial authorization after twenty days, and that extension was granted. Appellees have not pointed to any particular harm resulting from the court's oversight, and we have found none.

conversations over the Jenkins phone had failed to comply with the minimization mandate, and ordered suppression of conversations intercepted in that wiretap and all other evidence derived therefrom. The Government, after failing in its attempt to obtain reconsideration of the court's order, exercised its statutory right of appeal. 18 U.S.C. § 2518 (10)(b).

Minimization was but one of a number of issues urged upon the District Court during the extensive pretrial hearings. The defendants advanced individual contentions, as well as numerous common questions pertaining to the constitutionality of Title III and to the implementation of the statutory requirements in this case. Moreover, the court was at the time essentially writing on a clean slate. Few appellate decisions existed to offer guidance in the resolution of the many complex constitutional and statutory problems underlying Title III, and this court had not as yet spoken to those questions at all. *James* now teaches that the District Court properly rejected appellees' constitutional challenge to the provisions of Title III. United States v. James, 161 U.S.App.D.C. 88, 494 F.2d 1007, 1020 (1974). Moreover, we have examined the affidavit filed in support of the application for authorization to intercept conversations on the Jenkins phone, and we feel that the court properly rejected all challenges to its sufficiency. *See id.* at 1021. Finally, we concur in the court's rejection of appellees' contentions that the authorizing order insufficiently particularized the conversations that could be intercepted.

II

[1] The Government asserts that the court erred in permitting each "aggrieved person," in the language of the statute, to raise a minimization objection based on the interception of conversations in which he did not participate, insisting that this enables appellees to assert the privacy interests of others in violation of long established principles of Fourth Amendment law. *See generally* Brown v. United States, 411 U.S. 223, 230 (1973), *and cases cited therein.* Pointing out that all of the conversations cited by the court involve either Geneva Jenkins or appellee Bernis Thurmon and third parties, the Government maintains that only Geneva Jenkins and appellee Thurmon have standing to suppress intercepted conversations.

The Congressional definition of "aggrieved person" was designed "to reflect-existing law." S.Rep.No. 90-1097, 90th Cong., 2d Sess., 91 (1968). *See also* Alderman v. United States, 394 U.S. 165, 175 n. 9, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); United States v. King, 478 F.2d 494, 506-507 (9th Cir. 1973); United States v. Doe, 451 F.2d 466, 469 (1st Cir. 1971). Moreover, Congress understood that this would serve to limit the statutory remedy so as not to "press the scope of the suppression rule beyond the present search and seizure law." S.Rep.No. 90-1097, *supra*, at 96.

[2] There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute.[4] As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interceptions of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a)(iii). The question presented by the Government's challenge is really whether some of the appellees can introduce evidence based on conversations in which they did not participate in order to attempt to demonstrate that the intercepted conversations to which they were a party were not, in the statutory phrase, seized "in conformity with the order of authorization."[5]

[4] Section 2510(11) defines an "aggrieved person" to be any person "who was a party to any intercepted wire or oral communication" or a person "against whom the interception was directed." 18 U.S.C. § 2510(11). Each appellee claims to have been a party to an intercepted conversation, and the Government does not contest this claim. Section 2518, in turn, states that aggrieved persons "may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Id. § 2518(1)(a). *See* United States v. Giordano, *infra*, 469 F.2d 522 (4th Cir. 1972).

[5] The Government's argument on standing is correct insofar as it relates to the question of which conversations an individual aggrieved person might suppress upon proof that the monitoring agents failed adequately to minimize. As Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), indicates, the prohibition against assertion of another's rights normally would preclude an aggrieved person from suppressing a conversation in which he did not participate. *See* United States v. Poeta, 455 F.2d 117, 122 (2d Cir. 1972).

On this appeal the Government argued vigorously that, even assuming a breach of the statutory minimization requirement, it was error for the District Court to exclude all of the intercepted conversations, including those clearly related to narcotics. Since the question of the appropriate remedy for such breach does not arise until the breach itself is established, we do not, in view of the disposition we make of this appeal, find it necessary to address that question.

[6] Although the opinion does not so indicate, the transcript of the hearings reveals that the Government unsuccessfully pressed this argument upon the District Court.

[7] We do not mean to imply that in all cases the District Court should allow each aggrieved person access to the totality of the intercepted conversations in order to prove a minimization challenge. Title III makes the authorizing judge the custodian of the intercepted conversations. 18 U.S.C. § 2518(8)(a), (d). Additionally, Section 2518(10) states that the judge, upon the filing of a motion to suppress, "may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." There may be cases in which the district judge determines that he can confidently rule on the minimization question without permitting complete access to all of the intercepted conversations.

[3] Any inquiry into possible noncompliance with the minimization requirement is, by its very nature, one that calls for an examination of the totality of the monitoring agents' conduct during the duration of the authorized interception. Fragmenting the minimization inquiry in the manner suggested by the Government would force the court to adopt an unrealistically narrow view of the issue, thus making any assessment of the overall reasonableness of the agents' conduct a highly artificial exercise. The District Court properly recognized this, and rejected the Government's argument.[6] The court also properly recognized the necessity of assessing the totality of the agents' conduct, and indeed considered the cited conversations only as examples of their actions. *See* Scott, *supra*, 331 F.Supp. p. 2, at 247. We find no error in this regard.[7]

[4, 5] Examination of the District Court's resolution of the merits discloses, however, that the court did apply an improper standard in assessing the agents' alleged noncompliance with the minimization requirement. As *James* and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception. *See*

also United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974); United States v. Focarile, 340 F.Supp. 1033 (D.Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty percent of the intercepted conversations appeared to be unrelated to narcotics transactions. This, together with the fact that the agents intercepted all of the conversations conducted during this period of authorization, in the opinion of the District Court, "strongly indicate[d] the indiscriminate use of wire surveillance that was proscribed by *Katz* [Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576] and *Berger* [Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040]." *Scott, supra,* 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209, p. 2, at 247. The court purported to find confirmation of this initial impression in its examination of certain conversations which, in its opinion, clearly should not have been intercepted.

[6] This court's intervening opinion in *James* indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis. For example, a substantial number of the intercepted conversations that cannot be classified as narcotics-related appear to have been either very short in duration or extremely ambiguous in nature, or both. Interception of those conversations cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their termination. *See* United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974). And, if the Government's characterization of the number of intercepted conversations of this type proves substantially correct, it would appear that the District Court's determination that sixty percent of the intercepted calls were unrelated to narcotics substantially overstates the case for noncompliance with the order to minimize. Likewise, the cited conversations between appellee Geneva Jenkins and her mother must be examined more carefully.

While all of the conversations may appear in retrospect to have been innocent, that does not necessarily indicate that each interception was unreasonable. The conduct of the agents must be assessed in light of the information available to them at the time. If the Government's assertion that agents had reasonable cause to suspect the mother's knowledge of the narcotics conspiracy proves correct, interception of those conversations would not be unreasonable, at least until such time as the initial suspicion should have been dissipated.

III

While examination of the District Court's opinion persuades us that the court applied improper standards in resolving the minimization question, we cannot with equal certainty determine what the proper resolution of the issue should be. Many of the underlying facts essential to an assessment of the reasonableness of the agents' conduct have not been established. Much of the Government's argument in this court is based on an analysis prepared by it of the intercepted calls, including its resulting characterization of the information available to the agents at the time of the particular interceptions. This comprehensive analysis was not made available to the court prior to the motion for reconsideration of its suppression order, and the transcript of the hearing on that motion indicates that it was not carefully examined at that time.

The call analysis, while not technically new evidence, may suffer some of the same infirmities. It may, for example, contain errors of characterization or other factual inaccuracies that can best be identified and corrected in adversarial proceedings. Likewise, the Government's characterization of the nature of information available to the intercepting agents should be subject to appellees' scrutiny and challenge. Only after the court is satisfied that it has a complete and accurate picture of the agents' actions can it make a meaningful assessment of the reasonableness of their conduct.

The District Court, upon remand, should accept the call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reason-

ableness of the agents' conduct in light of *James* and the comments contained herein.

The suppression order is vacated without prejudice, and the case is remanded to the District Court for re-examination of the minimization issue in the light of *James* and for further proceedings consistent herewith.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. FRANK R. SCOTT, et al. and UNITED STATES OF AMERICA vs. BERNIS L. THURMON, et al.	Criminal No. 1088-70 Filed Nov. 12, 1974 James F. Davey, Clerk Criminal No. 1089-70

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit, directing this Court to reexamine the minimization issue in the light of *James* (*United States* v. *James*, 494 F.2d 1007 (1974)) and for further proceedings consistent with its order of remand. It directed the Court to ". . . accept the 'call analysis' and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of *James* and the comments contained therein."

In compliance with the Remand Order of the Court of Appeals this Court held evidentiary hearings on October 15, 16, 17 and 18. It received into evidence the "call analysis" made by former Assistant U. S. Attorney Phillip Kellogg, the daily reports of the listening agents as compiled by the supervising agent; the reports of the supervising agent to Harold J. Sullivan, the Assistant U. S. Attorney in charge of the investigation, and the periodic reports of Mr. Sullivan to Judge Smith. Oral testimony was given by Special Agent Glennon L. Cooper, who was in charge of the investigation, by Mr. Kellogg, who prepared the "call analysis" and others. The Court also reexamined the entire transcript of the hearings conducted in April, 1971, and heard arguments of counsel.

Based upon the foregoing reexamination this Court finds:

1. That Title 18, Section 2518(5) of the United States Code requires that

> "(E)very order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . .".

2. That the orders and extension of Judge Smith authorizing the interceptions in this case contained the direction to the agents manning the tap that was required by Title 18, Section 2518(5).

3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.

4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

5. That the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of "business" phone as was used in *James*.

6. That the monitoring agents made daily reports of all calls intercepted and classified them as to whether they were narcotic related or not narcotic related.

7. That these daily reports and classifications were turned over to Mr. Sullivan and Mr. Sullivan presented the information and classifications contained in these reports to Judge Smith without modification.

8. That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.

9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize.

10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath that the telephone calls fell into the classifications mentioned in Paragraph 9 above. He also testified that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows:

BY THE COURT:

Q. Agent Cooper, at a hearing—at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A. That is correct, Your Honor.

Q. And also that there were times when you, yourself, did the listening?

A. That's correct.

Q. The question I wish to ask you is this, whether at any time during the course of the wiretap—of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtain the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A. That is correct, Your Honor.

11. After hearing testimony of Agent Cooper in April, 1971, after the Court had entered an order suppressing the evidence gathered by reason of the admitted failure to even attempt to comply with the Statute and the minimization order, the Assistant U. S. Attorney then in charge of the case made the "call analysis" and filed a motion to reconsider.

12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap."

Mr. Kellogg described the "call analysis" as ". . . purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to *infer, or assert that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no*[t] insofar as I understand." Tr. Hearing on Remand, p. 436. (Emphasis supplied).

12a.* The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.

13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.

14. During the period of the intercepts there were conversations between persons at the Jenkins intercept and others at the Linnean Avenue intercepts. On occasion these communications revealed information and set in motion other conduct and types of surveillance that would not otherwise have been known or undertaken by the investigators.

CONCLUSIONS OF LAW AND ORDER

1. The Statute in this case imposes an absolute ban on electronic surveillance except under circumstances authorized by specific procedures which are not mere technical steps. *United States* v. *Giordano*, 469 F.2d 522, *affirmed*, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (May 13, 1974).

2. Title 18, Section 2518(10)(a)(iii) provides for the suppression of ". . . the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that— . . . that the interception was not made in conformity with the order of authorization or approval."

3. The "call analysis" in this case is an after-the-fact non-validated presentation of counsel for the Government and

* Since there appear to be two paragraphs labelled "12," the second of the two will be referred to as "12a."

does not and was not intended to establish that the monitoring agents complied with the minimization statute and order.

4. The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of a search is not to be determined by what is found. *Byars* v. *United States*, 273 U.S. 28, 29; *United States* v. *Di Re*, 332 U.S. 581. While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the Statute and order of the Court. Failure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. *Sabbath* v. *United States*, 391 U.S. 585.

5. Inasmuch as the conduct of the monitoring agents was unreasonable the intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, including communications between the Jenkins' telephone and the two Lee telephones and all surveillance and conduct emanating from said communications should be and they hereby are suppressed.

JOSEPH C. WADDY
United States District Judge

Date: November 12, 1974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES of America,
Appellant,

v.

Frank Ricardo SCOTT, a/k/a
"Reds," et al.

UNITED STATES of America,
Appellant,

v.

Bernis Lee THURMON, a/k/a
Benjamin Thornton, et al.

Nos. 74-2097, 74-2098.

Argued April 23, 1975.

Decided July 25, 1975.

Opinion for the court filed by Circuit Judge MacKINNON.

MacKINNON, *Circuit Judge*:

The Government appeals from an order of the District Court suppressing all evidence derived from judicially authorized wiretaps because of a failure to observe the statutory requirement for minimization of the interception of telephone conversations.[1] The order under review was entered following a remand by this court reversing an earlier

[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, 2520, makes the following provision for minimization of intereceptions:

> Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, . . .

18 U.S.C. § 2518(5) (1970).

order of the District Court which had suppressed the same evidence on identical grounds. *United States* v. *Scott*, 164 U.S.App.D.C. , 504 F.2d 194 (1974). We hold that the District Court failed to correctly apply the standards set forth in our earlier remand and therefore a reversal of the suppression order is again necessary. Because of the extended period of time which has elapsed since the commission of the offenses in question, we have undertaken a review of the intercepted conversations rather than remanding for additional consideration by the trial court. This study convinces us that suppression of the evidence seized through the wiretaps is not appropriate in this case and the District Court accordingly should bring appellants to trial as soon as possible.

I

The material facts occurring prior to the initial remand are set forth in this court's opinion in *United States* v. *Scott, supra.* The decision of that appeal was held in abeyance pending issuance of the opinion in *United States* v. *James*,[2] wherein this court established standards for assessing compliance with the minimization requirement. *James* identified four factors which determine the degree of minimization required in a given case: (1) scope of the criminal enterprise under investigation; (2) location and operation of the subject telephone; (3) Government expectation of the content of the calls; and (4) judicial supervision by the authorizing judge. 494 F.2d at 1019-21.

After *James* issued, we determined that the District Court had applied an improper standard in reaching its decision to suppress the wiretap evidence in the instant case:

> As *James* and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception. . . .
>
> It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty

[2] 161 U.S.App.D.C. 88, 494 F.2d 1007, *cert. denied*, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974).

> percent of the intercepted conversations appeared to be unrelated to narcotics transactions. . . .
>
> This court's intervening opinion in *James* indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis.

504 F.2d at 198. However, since we concluded that the record did not contain all the facts necessary for an assessment of the reasonableness of the agents' conduct, the case was remanded with the following directions:

> The District Court, upon remand, should accept the call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of *James* and the comments contained herein.

504 F.2d at 199.

Following our remand, the District Court held four days of evidentiary hearings, received into evidence the Government's "Call Analysis" [3] and the various reports made dur-

[3] The "Call Analysis" is a document prepared by the Assistant U.S. Attorney in charge of the case after the District Court had entered its original order suppressing the evidence seized in the wiretaps. It divides the intercepted conversations into seven categories, producing the following results:

Category	Number of Conversations	Percentage of Total Interceptions
NS—Communications which in substance relate to the narcotics enterprise.	126	32.8
NP—Communications which relate to the narcotics enterprise in part.	7	1.8
ME—Communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value.	21	5.4
A—Communications so ambiguous that their purpose cannot be determined.	142	36.9
R—Communications consisting totally of a recorded message.	27	7.0
UNRE—Communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material.	55	14.3
UN—Communications which are unrelated to the narcotics enterprise and which were intercepted with no reasonable expectation of related material.	6	1.56
Total Interceptions:	384	

> ing the course of the intercept, and heard testimony by the Special Agent in charge of the investigation and the former Assistant U.S. Attorney who had prepared the Call Analysis. Based on this evidence, the court concluded that the Call Analysis is "an after-the-fact non-validated presentation of counsel for the Government" [4] and therefore rejected it in favor of the original characterization by the intercepting agents that 40% of the intercepted calls were narcotic related and 60% were not narcotic related. With respect to the *James* criteria, the court found that the taps were placed on residential rather than "business" telephones, that the interceptions revealed a criminal operation of lesser scope than originally anticipated, and that the authorizing judge was never informed that the agents were making no attempt to minimize.[5] Rather than seeking to identify specific conversations which should not have been intercepted, the court found that the admitted knowing and intentional failure by the monitoring agents to terminate the interception of any conversation rendered their conduct unreasonable and thus suppression of all evidence derived from the wiretaps was necessary.

II

[1, 2] Before analyzing the most recent suppression order, a few general observations about the meaning of the minimization requirement are appropriate. The statute provides that all wiretaps "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." [6] Since interceptions need only be "minimized," Congress quite clearly contemplated that some irrelevant conversations will inevitably be intercepted. To hold that the monitoring agents must make a determination whether to minimize in the course of each individual conversation would be an open invitation to criminals to escape detection by the simple device of devoting the initial part of each call to non-criminal matters. Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. Once the monitoring agents have sufficient data to conclude that a particular type of conversation is unrelated to the criminal

[4] Conclusions of Law, ¶ 3.

[5] Findings of Fact, ¶¶ 5, 8, and 9, respectively.

[6] 18 U.S.C. § 2518(5) (1970).

investigation, the minimization requirement obliges them to avoid intercepting future conversations as soon as they can determine that it falls within that category. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization.[7] In addition, even after such a category is developed, it will likely still be necessary to intercept a small portion of each call to determine whether it falls into the category being minimized.[8]

Where neither party to the conversation is believed to be a participant in the criminal activity under investigation, the decision to minimize interception of their calls should be easily reached. Where at least one party is a suspected participant in the criminal conduct, the agents will need to amass considerably more data before they can reasonably conclude that further interception will produce no relevant information. It is of course possible that conversations involving suspected conspirators will deal exclusively with topics other than the conspiracy, but it is unlikely that such conversations will be readily subject to minimization.

[7] In United States v. Quintana, 508 F.2d 867 (7th Cir. 1975), the court gave the following description of the procedures to be used by the monitoring agents:

> Where the government does not at the outset have reason to believe that any identifiable group of calls will be innocent, then it may be reasonable to monitor all calls for some time. If the agents learn from this initial total interception that there is a pattern of innocent conversations, then they should cease eavesdropping on that group during the remainder of the tap. *Cf.* United States v. Focarile, 340 F.Supp. 1033 (D.Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), rev'd on other grounds, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).
>
> To state that agents must seek a method of separating innocent from incriminating conversations is not to say that such a pattern will always be identifiable. The problem is that "... it is often impossible to determine that a particular telephone conversation would be irrelevant and harmless until it has been terminated.
>
> . . . . . .
>
> It is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take."

United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), quoting United States v. LaGorga, 336 F.Supp. 190, 196 (W.D.Pa. 1971).
508 F.2d at 874.

[8] It is . . . obvious that no electronic surveillance can be so conducted that innocent conversation can be totally eliminated. Before a determination of innocence can be made there must be some degree of eavesdropping.
United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974).

III

As we stated in *James*, the standard of minimization is reasonableness which must be determined from the facts of each case:

> The congressional reports accompanying the wiretap statute and decisions interpreting 18 U.S.C. § 2518(5) make it clear that the minimization standard, like the standards traditionally applied to the determination of probable cause, is one of reasonableness which must be ascertained from the facts of a given case. "What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance." S.Rep.No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. & Admin.News 1968, p. 2190 (1968).

494 F.2d at 1018.

Throughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations.[9] Thus its position has of necessity been that interception of all 384 conversations was reasonable under the facts of this case. The District Court, however, found that the failure to attempt minimization was itself proof that the interceptions were unreasonable:

> The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic related.

Conclusions of Law, ¶ 4.

[3, 4] Since the extent of minimization required in a particular case can only be determined during the course of the wiretap,[10] the District Court was clearly in error in

[9] It was initially determined that calls involving privileged matters, *i.e.* calls between doctor and patient, attorney and client, and priest and penitent, would not be intercepted. Oct. 1974 Tr. 93. The only instance in which an interception was terminated prematurely was one case—here the tap was connected to the wrong telephone line. Oct. 1974 Tr. 79.

[10] Appellants are correct in asserting that the validity of a search is not to be determined by what is found, as a general principle. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); Byars v. United States, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520 (1927). However, that principle is not relevant to the question of compliance with the minimization requirement, which necessarily turns on what is discovered in the course of the wiretap.

asserting that the agents' behavior would be unreasonable under any circumstances. On the contrary, if every call intercepted had been narcotic related, there would have been no occasion to consider whether it was necessary to minimize. Our decision in *James*, which also involved a total surveillance, makes it clear that interception of all conversations may be consistent with minimization in appropriate circumstances.[11]

[5] The trial court's error here lies in focusing on the reasonableness of the agents' intent rather than on the reasonableness of the particular interceptions which took place. The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied, but the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.[12]

[6] The instant case of course does not present a situation where 100% of the intercepted conversations were nar-

[11] *See also* United States v. Quintana, 508 F.2d 867, 873 (7th Cir. 1975); United States v. Manfredi, 488 F.2d 588, 599–600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974); and United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974), each upholding interception of all calls over periods of 20 days or longer.

[12] *James* states:

> The minimization requirement is satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusion."

494 F.2d at 1018 (emphasis in original). While this language indicates that the attitude of the agents is a relevant factor to be considered, we believe that the decisive factor is the second element—the objective reasonableness of the interceptions. When the monitoring agents fail to manifest "a high regard for the right of privacy," the Government will simply have a heavier burden of showing that the interceptions were reasonable.

cotic related. Thus it is necessary to determine whether interception of those calls which cannot be classified as narcotic related was nonetheless reasonable under the circumstances of this case. In deciding that they were not, the trial court placed heavy reliance on the original reports to the supervising judge which stated that only 40% of the calls were narcotic related, concluding that this data indicated a substantial number of conversations were not properly subject to interception and therefore minimization should have taken place. However, even if 60% of the calls were not related to narcotics transactions, it does not necessarily follow that the interception of these calls was unreasonable.[13] As we indicated in the remand order, the reasonableness of the interceptions must be assessed on a "particularized basis."[14] Before the court can hold that the agents failed to comply with the minimization requirement, it is necessary to show that some conversation was intercepted which clearly would not have been intercepted had reasonable attempts at minimization been made.

It is generally agreed that approximately 40% of the 384 conversations intercepted in this case were narcotic related and thus were properly intercepted. Of the remainder, many were of very short duration and were terminated before their relevance could be determined.[15] Others were

[13] Consider, for example, United States v. Quintana, 508 F.2d 867 (7th Cir. 1975), where of approximately 2000 calls that were intercepted, only 153 were considered germane enough to be transcribed, and only 47 were used at trial; and United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974), where of over 1000 calls monitored, only 150 were possibly relevant. Each court nonetheless found the interceptions to be reasonable and declined to suppress the evidence seized.

[14] 504 F.2d at 198.

[15] Other courts have held that any intercepted conversation lasting less than two minutes should be disregarded in evaluating compliance with the minimization requirement. *See, e.g.*, United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974):

> The record here discloses that out of 2058 completed phone calls, 1277 of them (more than half) were completed in less than 2 minutes. Since, in a case of such wide-ranging criminal activity as this, it would be too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation as merely social or possibly tainted, we eliminate these calls from consideration. See United States v. Sisca, 361 F.Supp. 735, at 744 (S.D.N.Y. 1973); United States v. Focarile, 340 F.Supp. 1033, 1050 (D.Md.), aff'd sub nom., United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), cert. granted, 411 U.S. 905, 93 S.Ct. 1530, 36 L.Ed.2d 194 (1973);

extremely ambiguous in nature and possibly involved the use of codes to mask their true purpose. With respect to both types of call, we stated in *Scott*:

> Interception of those conversions cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their termination.

504 F.2d at 198. This generally eliminates from consideration the group of calls classified as "ambiguous" in the Government's Call Analysis. Of the remaining 16% of the interceptions, many were one-time conversations which afforded the monitoring agents no opportunity to develop a category of innocent calls whose interception should be minimized.

The only conversations which have been specifically identified during the course of these proceedings as potentially subject to a minimization requirement are the so-called "Geneva-Mother" calls. These are seven calls between Geneva Jenkins, an accused conspirator, and her mother, which occurred on January 26, twice on January 27, January 28, twice on February 4, and February 12.[16] In *Scott*, this court made the following observations with respect to these calls:

> While all of the converations may appear in retrospect to have been innocent, that does not necessarily indicate that each interception was unreasonable. The conduct of the agents must be assessed in light of the information aavilable to them at the time. If the Government's assertion that agents had reasonable cause to suspect the mother's knowledge of the narcotics conspiracy proves correct, interception of those conversations would not be unreasonable, at least until such time as the initial suspicion should have been dissipated.

504 F.2d at 198 99. Further examination of the record leads us to conclude that the agents did not act unreasonably in intercepting these conversations.

United States v. LaGorga, 336 F.Supp. 190, 196 (W.D.Pa. 1971). Our concern is with the 781 conversations which lasted 2 or more minutes.

485 F.2d at 500. A large number of the calls intercepted in the instant case would be excluded under this principle, including most of those classified as "ambiguous" and all the recorded messages.

[16] These appear in the transcript of the tape of the interceptions at pages 24, 41, 44, 55, 132, 136 and 247 respectively.

[7] The first four calls were intercepted over a period of three days at the outset of the wiretapping and were of moderate length, each covering three or fewer pages of transcript. The second and fourth calls contain statements by Geneva which suggest that her mother may have had knowledge of the "business" operated by "Bernie" Thurmon. See Tape Tr. 42, 55. The fifth and sixth calls took place a week later. In each, the mother states that she has something to tell Geneva which she cannot mention over the telephone because "you ain't suppose[d to] talk *business* on the phone." Tape Tr. 134 (emphasis added). The seventh call is a lengthy conversation in which the only material which could possibly have been related to the narcotics investigation is a statement by the mother that one "Reds," who was in some way involved in the conspiracy, had called and asked for a telephone number. This call is a good example of a seemingly innocent call that might have turned out to incriminate one of the callers as participating in the criminal activity.

While it is apparent in retrospect that none of these conversations were material to the investigation of the narcotics conspiracy, the agents cannot be said to have acted unreasonably at the time they made the interceptions. The repeated references to "business" were sufficient to give them a reasonable belief that future interceptions might produce material evidence, and all such references were probative of scienter. If the "Geneva-Mother" conversations had continued to the end of the wiretap, or if there had been a greater number of them, we might well conclude that at some point the agents could no longer have had a reasonable expectation of discovering material evidence and thus should have acted to minimize the interceptions. However, we do not believe that such a point was reached in this case. Because we find no category of conversation which would have required the institution of a minimization procedure by the monitoring agents, and appellants have identified none, it should necessarily follow that the interceptions were not unreasonable. We also apply the *James* criteria to show that the extent of the surveillance was not unreasonable under the particular facts of this case.

1. *Scope of the criminal enterprise*: The trial court made no specific findings with respect to this factor. However, it is clear that appellants were operating a fairly extensive narcotics business. A thorough surveillance of their activi-

ties was necessary to disclose the extent of their conspiracy and the identity of the conspirators.[17] In addition, there was testimony that the conspirators used coded language and would occasionally discuss irrelevant matters at the outset of a conversation (Oct. 1974 Tr. 75-78, 354-58). As *James* states:

> Where the members of a conspiracy act with great circumspection, agents may be justified in monitoring a significant part, or perhaps all, of a conversation in order to be sure that it is indeed innocent. A number of reported cases have noted the use of codes within narcotics conspiracies so that superficially innocent conversations are actually highly relevant to the investigation. . . . Another technique often found is the use of guarded language or the deliberate discussion of irrelevant matters during the early moments of a conversation so that; if the conversations are being monitored, agents, assuming the call to be innocent, will cease the interception.

494 F.2d at 1019. Similar elements in the present case also justified a more intense surveillance.

[8, 9] 2. *Use of the telephone*: While these telephones were not devoted to "business" purposes to the same extent as the one tapped in *James*, the fact that at least 40% of the calls were related to the narcotics operation suggests that they were not entitled to the same extent of protection as would be afforded in the case of telephones used primarily for lawful purposes. The trial court appears to have relied heavily on the fact that the telephones in this case were located in residences in finding that they were not the type of "business" phones that were involved in *James*. Be that as it may, they were heavily used in the narcotics "business" and the fact that they were located in residences does not immunize them from a court ordered interception. The actual use of the telephones is at least as relevant to the question of the level of surveillance which is reasonable as is their physical location. See *James*, 494 F.2d at 1020. In this case, the high proportion of narcotic related calls justified a more intensive surveillance than would be justified where the traffic in narcotics related calls was much lighter.

[17] *See James*, 494 F.2d at 1019:

> Where the criminal enterprise under investigation is a large-scale conspiracy with many participants, it may be necessary for the government to monitor more conversations with greater intensity than when the investigation is more limited.

3. *Government expectation of the contents of the calls*: On this point, the District Court concluded that the criminal operation discovered was of lesser dimension than originally anticipated. It is conceded that the agents originally expected to uncover an operation dealing in the interstate importation and distribution of narcotics. What they found instead was a local retail outlet serving numerous pushers and users. While what was discovered may be classified as less far reaching geographically, it does not necessarily follow that a less intensive surveillance of the operation would suffice to obtain the evidence needed to support a successful prosecution of the participants. What occurred here was a change in the nature of the operation, not a change in the scope of the activity discovered. Appellants' operation was sufficiently large that it required a relatively extensive surveillance to disclose the features of the conspiracy. As this court stated in *James*, "[i]f the fruits of the tap in its early stages reveal a pattern of criminal conduct unknown to the government at the time of the initiation of the tap, then an expanded policy of interception (within the confines of the court order) may be justified." 494 F.2d at 1020-21.

[10] 4. *Judicial supervision*: It is true that the supervising judge was never specifically informed that the agents were not minimizing the interception of any conversations. However, the reports made to him every five days by the monitoring agents, which were relied upon by the trial court in reaching its conclusion that the agents were not acting reasonably, disclosed the number of calls that were intercepted and the number of those which were narcotic related.[18] It is thus clear that the judge was aware of the number of irrelevant conversations which were being intercepted and could have modified the wiretap authorization had he believed that any such action was appropriate. This interception order only ran for thirty days, not an overly long period for a wiretap in a narcotics conspiracy case, and we find no deficiency in the judge's supervision which would justify a conclusion that the wiretaps were conducted in an unreasonable manner. However, in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision

[18] *See* Findings of Fact, ¶¶ 6, 7.

requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize. This will guarantee that the uncertainties in this record are not duplicated in future cases and will further the intent of Congress.

Since we conclude that interception of all 384 conversations was not unreasonable under the circumstances of this case, the evidence seized by the wiretaps is not subject to suppression for failure to comply with the statutory minimization requirement.[19] We therefore reverse the order suppressing all evidence derived from the wiretaps and

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[19] Because we find that the minimization requirement was not violated, we have no occasion to consider the appropriate remedy in the event of a violation. However, we note that those courts which have considered the issue have concluded that suppression should be limited to the evidence seized which was beyond the scope of the wiretap authorization. *See* United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974):

> Furthermore, even if the surveillance in this case did reflect a failure to minimize, it would not follow that Congress intended that as a consequence all the evidence obtained should be suppressed. Quite the contrary, 18 U.S.C. § 2517 manifests an intent to utilize *all* the evidence obtained by eavesdropping, and § 2517(5) expressly permits the use in court of evidence obtained by wiretap of a crime other than the crime upon which the court order was premised. Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted. If appellants, and the unindicted persons whose conversations were overheard, have any remedy under Title III other than the suppression of conversations outside the warrant's scope, it lies in § 2520 as a civil suit against the investigating officers alleging that they exceeded their authority. *See* United States v. LaGorga, 336 F.Supp. at 196–197.

(Footnote omitted.) *See also* United States v. Sisca, 361 F.Supp. 735, 746 47 (S.D.N.Y. 1973), *aff'd* 503 F.2d 1337 (2d Cir. 1974); United States v. Mainello, 345 F.Supp. 863, 874–77 (E.D.N.Y. 1972); United States v. King, 335 F.Supp. 523, 543–45 (S.D.Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974); *cf.* United States v. Leta, 332 F.Supp. 1357, 1360 n.4 (M.D.Pa. 1971); United States v. Lanza, 349 F.Supp. 929 (M.D.Fla. 1972).

In fact, the principal case ordering total suppression as the proper remedy is the District Court's first suppression order in the instant case, United States v. Scott, 331 F.Supp. 233 (D.D.C.1971), which was subsequently vacated by this court. Even if the court was correct in holding that the agents had acted unreasonably in this case, does not appear that total suppression of the evidence obtained from the wiretap was the proper remedy in light of the above cases.

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remand the case to the District Court for further proceedings consistent herewith. In light of the large amount of time which we have noted has already elapsed in this case, we have expedited this opinion ahead of many others that were argued earlier, and the District Court is urged to bring appellants to trial as quickly as possible.

Judgment accordingly.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2097
United States of America,
Appellant
v.
Frank Ricardo Scott,
a/k/a "Reds", et al.,

No. 74-2098
United States of America,
Appellant
v.
Bernis Lee Thurmon,
a/k/a Benjamin Thornton,
et al.,

September Term, 1975
Criminal 1088-70
United States Court of Appeals for the District of Columbia Circuit
Filed Oct. 3, 1975
Hugh E. Kline, Clerk
Criminal 1089-70

ORDER

Appellants' suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc,* it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

For the Court:
HUGH E. KLINE
Clerk

Received Oct. 6, 1975

rdm

Statement of Circuit Judge Robinson, with whom Chief Judge Bazelon and Circuit Judges Wright and Leventhal concur, as to why he would grant rehearing *en banc* attached.

No. 74-2097—United States v. Scott
No. 74-2098—United States v. Thurmon

STATEMENT OF CIRCUIT JUDGE ROBINSON, WITH WHOM CHIEF JUDGE BAZELON AND CIRCUIT JUDGES WRIGHT AND LEVENTHAL CONCUR, AS TO WHY HE WOULD GRANT REHEARING EN BANC

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

The decision in these cases appears to be seriously inconsistent with our earlier decision in *United States* v. *James.*[1] Beyond that, the extent to which judicial interpretations of a statute sanctioning telephone wiretaps may tolerate otherwise unconstitutional invasions of privacy is a question of exceptional and recurring importance. For these reasons—traditional foundations for full-court consideration [2]—I would grant rehearing *en banc* in these cases.

The governing statute requires all judicially authorized wiretapping to "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . ." [3] *James* adopted a construction of this provision which was formulated originally by the Second Circuit.[4] Under the *James* standard, the duty to minimize is satisfied "if 'on the whole the [intercepting] agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusions.'" [5] Thus *James* demands an inquiry as to the intercepting' agent's subjective intent to mininize the interception of innocent calls, as well as an objective determination that the agent could reasonably have believed that calls actually intercepted were likely to be illicit.[6]

The instant decision acknowledges this holding in *James,*

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[1] 161 U.S.App.D.C. 88, 494 F.2d 1007, *cert. denied,* 419 U.S. 1020, 95 S.Ct. 495, 43 L.Ed.2d 294 (1974).

[2] See Fed.R.App.P. 35(a).

[3] Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, tit. III, § 802, 82 Stat. 218 (1968), 18 U.S.C. § 2518(5) (1970).

[4] *United States* v. *Tortorello,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

[5] *United States* v. *James, supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018, quoting *United States* v. *Tortorello, supra* note 4, 480 F.2d at 784 (emphasis in *James*).

[6] *United States* v. *James, supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018.

but concludes that although the agents' attitude "is a relevant factor to be considered, . . . the decisive factor is the second element—the objective reasonableness of the interceptions." [7] The first element is relegated to a far less significant position: "[t]he subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure;" [8] [w]hen the monitoring agents fail to manifest 'a high regard for the right of privacy,' the Government will simply have a heavier burden of showing that the interceptions were reasonable." [9] Indeed, that court now says that "the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable." [10]

Despite the admitted fact that "[t]hroughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations," [11] and the further fact, found by the District Court, that there was a "knowing and purposeful failure by the monitoring agents to comply with [its] minimization order," [12] the decision herein rejects the District Court's ruling "that the failure to attempt minimization was itself proof that the interceptions were unreasonable." [13] The opinion does concede that "[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirements has been satisfied." [14] But the court stresses that in the final analysis "the decision on . . . suppression . . . must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions." [15]

This interpretation effectively destroys the subjective criterion of *James*' two-pronged standard for minimization

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[7] *United States* v. *Scott*, No. 74-2097 (D.C. Cir. July 25, 1975), at 1301 n.12.

[8] *Id.* at 1301.

[9] *Id.* at 1301 n.12, quoting *United States* v. *James*, *supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018.

[10] *United States* v. *Scott*, *supra* note 7, at 1301.

[11] *Id.* at 1300.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1301.

[15] *Id.*

efforts, and fatally undermines the force of the minimization requirement itself. Once the decisive test of the validity of an interception becomes its "objective reasonableness," [16] there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps. This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner,[17] and any decision which implies that Fourth Amendment safeguards apply should itself define the extent to which would-be wiretappers must maintain allegience to the statute and the Fourth Amendment.

No. 75-5688. SCOTT ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 170 U. S. App. D. C. 158, 516 F.2d 751. April 5, 1976.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court today again refuses to grant certiorari to consider the proper implementation of the "minimization" requirement of 18 U.S.C. § 2518 (5), one of the core provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See, *e.g.*, *Bynum* v. *United States*, 423 U. S. 952 (1975) (BRENNAN, J., dissenting from denial of cert.). The "minimization" provision, which requires that every order and extension thereof authorizing electronic surveillance shall "contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter,"

> "constitutes the congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967). Congress has explicitly informed us that the 'minimization' and companion safeguards [*e.g.*, §§ 2518 (3)(a), (b), (c), and (d)] were designed to assure that 'the order will link

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[16] See text *supra* at note 7.

[17] See note 18, *infra*.

> up specific person, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.' S.Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968)." *Bynum* v. *United States, supra,* at 952.

When the Court denied certiorari in *Bynum,* I indicated my reasons for believing that "we plainly fail in our judicial responsibility when we do not review these cases to give content to the congressional mandate of 'minimization,'" particularly since guidance for judges authorizing electronic surveillance "is absolutely essential if the congressional mandate to confine execution of authorized' surveillances within constitutional and statutory bounds is to be carried out." *Id.,* at 958-959, 953. That review is no less appropriate now. Indeed, it is even more urgent in light of the proliferation of opinions—exemplified by this case from the Court of Appeals for the District of Columbia Circuit—sanctioning round-the-clock surveillance in which every conversation, whether innocuous or incriminating, is intercepted.

The facts of this case are relatively simple. The Government sought and obtained authorization to intercept wire communications over a certain specified telephone on the ground that there was probable cause to believe that certain named individuals were using that telephone in connection with the commission of narcotics offenses, and that information concerning the offenses would be obtained through the interception of the communications over the telephone. The order authorized the interception of conversations relating to the illegal importation and transportation of narcotics and, as required by § 2518 (5), specified that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

Although the monitoring agents were aware of the minimization requirement, the agent in charge testified that no attempt was made to minimize the interceptions. In fact, the agents listened to and recorded each and every one of the 384 calls completed over the subject telephone during the 30 days the surveillance was in effect, even though the agents' contemporaneous reports to the supervising judge classified the intercepted calls as only 40% narcotics related and 60% non-narcotics related. The agents also never informed the judge that they were taking no steps to minimize the amount of surveillance.

After the surveillance was terminated and petitioners and others were arrested, the District Judge conducted pretrial hearings on the question whether all evidence obtained during the surveillance, and the fruits thereof, had to be suppressed on the ground of noncompliance with the minimization mandate of the statute and the explicit provision of the wiretap authorization. The judge, finding that the agents "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it." 331 F. Supp. 233, 247 (1971), ordered the complete suppression of all evidence obtained directly or indirectly through the surveillance. *Id.,* at 248. On appeal, the Court of Appeals remanded for further consideration in light of another case in which it had adopted a test by which the statutory command of minimization was considered to be satisfied if monitoring agents made good faith efforts to minimize and if those efforts were reasonable. 164 U. S. App. D. C. 125, 504 F.2d 194 (1974).

On remand, further hearings were held, and the District Judge again concluded that "the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the [subject's] telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion." Crim. No. 1088-70, Nov. 12, 1974; App. 14a. The judge again acknowledged the "knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements," *id.,* at 17a, and held that this "admitted" "conduct would be unreasonable even if every intercepted call were narcotic-related." *Id.,* at 18a.

On appeal, the Court of Appeals again reversed, concluding that surveillance was reasonable because, in light of the conversations actually intercepted, it could not identify any categories of calls which could not have been reasonably intercepted even if minimization procedures had been instituted. 170 U. S. App. D. C. 158, 516 F.2d 751 (1975). The bad faith of the monitoring agents in not instituting any minimization procedures was thus deemed essentially irrelevant: the "agents could publicly declare their intent

to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable." *Id.*, at 163, 516 F.2d, at 756.

Rehearing en banc was denied, — U. S. App. D. C. —, 522 F.2d 1333, with four judges stating why they believed reconsideration by the full court was absolutely essential. Their statement is pertinent as an indication of the necessity for granting certiorari in this case. The dissenters observed, *id.*, at —, 522 F.2d, at 1333-1334 (Robinson, J., joined by Bazelon, C. J., and Wright and Leventhal, JJ.) (emphasis supplied, footnotes omitted):

> "The decision in these cases appears to be seriously inconsistent with our earlier decision in *United States* v. *James*, [161 U. S. App. D. C. 88, 494 F.2d 1007, cert. denied *sub nom. Tantillo* v. *United States*, 419 U. S. 1020 (1974)]. Beyond that, *the extent to which judicial interpretations of a statute sanctioning telephone wiretaps may tolerate otherwise unconstitutional invasions of privacy is a question of exceptional and recurring importance.* For these reasons—traditional foundations for full-court consideration—I would grant rehearing *en banc* in these cases.
>
> "The governing statute requires all judicially authorized wiretapping to 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . .' *James* adopted a construction of this provision which was formulated originally by the Second Circuit. Under the *James* standard, the duty to minimize is satisfied 'if "on the whole the [intercepting] agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusions."' Thus *James* demands an inquiry as to the intercepting agent's subjective intent to minimize the interception of innocent calls, as well as an objective determination that the agent could reasonably have believed that calls actually intercepted were likely to be illicit.
>
> "The instant decision acknowledges this holding in *James*, but concludes that although the agents' attitude 'is a relevant factor to be considered, . . . the decisive factor is the second element—the objective reasonableness of the interceptions.' The first element is relegated to a far less significant position: '[t]he subjective intent

> of the monitoring agents is not a sound basis for evaluating the legality of the seizure;' '[w]hen the monitoring agents fail to manifest "a high regard for the right of privacy," the Government will simply have a heavier burden of showing that the interceptions were reasonable.' Indeed, the court now says that 'the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable.'
>
> "Despite the admitted fact that '[t]hroughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations,' and the further fact, found by the District Court, that there was a 'knowing and purposeful failure by the monitoring agents to comply with [its] minimization order,' the decision herein rejects the District Court's ruling 'that the failure to attempt minimization was itself proof that the interceptions were unreasonable.' The opinion does concede that '[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirements [*sic*] has been satisfied.' But the court stresses that in the final analysis 'the decision on . . . suppression . . . must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.'
>
> "This interpretation effectively destroys the subjective criterion of *James*' two-pronged standard for minimization efforts, and fatally undermines the force of the minimization requirement itself. *Once the decisive test of the validity of an interception becomes its 'objective reasonableness,' there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretape.* This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner, and any decision which implies that Fourth Amendment safeguards apply less stringently to wiretaps than to other searches deserves close scrutiny by the entire court.

"Moreover, the practical ramifications of this decision are serious. It appears to destroy any incentive for law enforcement agents conducting wiretap surveillances to respect the rights of citizens to privacy in noncriminal telephone conversations in advance of their intrusion. *It is evident that when agents endeavor in good faith to honor these rights, innocent conversations are less likely to be intercepted. But when agents completely disregard their obligations to minimize no conversation is likely to escape their ears. That in my view is a result which hardly comports with a statute explicitly requiring minimization.* The court as a whole should take a hard look at these cases, and should itself define the extent to which would-be wiretappers must maintain allegiance to the statute and the Fourth Amendment."

Moreover, in *Walker* v. *United States, ante,* p. 917, in which the Court also denies certiorari today, a unanimous panel of the Court of Appeals for the District of Columbia Circuit declared that it would have found a violation of the minimization requirement had the Court of Appeals not denied rehearing en banc in *Scott:*

"This panel is of the view that § 2518 (5) was violated. However, this court in a case indistinguishable on this point, *United States* v. *Scott* . . . held otherwise. Since a suggestion to rehear *Scott en banc* was pending at the time this case was *sub judice,* this panel moved the court to rehear *Scott* and this case *en banc.* That motion was denied. . . . Under the circumstances, on this issue this panel is bound by the decision in *Scott.*" Memo., Crim. No. 1978-69, Oct. 3, 1975, p. 1; Pet. for Cert. 2a.

In light of the general importance of the minimization provision in the conduct of electronic surveillance and the conflict between the holding in *Scott* and other formulations of the minimization requirement, and especially in light of the *Scott* opinion's denigration of the importance of the monitoring agents' good-faith attempt to comply with the statute and its retroactive validation of a Fourth Amendment search on the basis of what was uncovered by the search, there is simply no justification for failing to grant the writ of certiorari in this case. The minimization issue is not clouded by other factors, and given the District Judge's findings of total noncompliance with the statutory command, only an unyielding hostility to the statutory command of minimization and to the constitutional interest in privacy which it was fashioned to protect, can motivate the Court to continue to refuse to review decisions which condone round-the-clock interception of every conversation that transpires during the conduct of a particular surveillance. No concern with crowded dockets, at a time when we review a not insubstantial number of trivial cases, can excuse the failure to address this crucial issue of statutory construction, fraught as it is with substantial constitutional overtones.

This refusal is not only inexcusable, but also especially anomalous in light of related actions by this Court in the electronic surveillance area. In *United States* v. *Kahn,* 415 U. S. 143 (1974), the Court, addressing the question of who must be named in an application and order authorizing surveillance, held:

"Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *Id.,* at 155.

In response to the argument of the Court of Appeals and the dissent, see *id.,* at 158-163 (Douglas, J., joined by BRENNAN and MARSHALL, JJ.), that such a conclusion would amount to approval of a general warrant proscribed by both Title III and the Fourth Amendment, the *Kahn* Court relied on the minimization mandate as an adequate safeguard to prevent such unlimited invasions of personal privacy, *id.,* at 154-155:

"[I]n accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations. . . . Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communication that came over the wire—and there is no indication that such abuses took place in this case."

Yet the Court has consistently refused, and today persists in that refusal, to confront a case presenting the minimization question and the abuse that emanates from the seizure of "every communication that came over the wire." Indeed,

the refusal is even more troubling since certiorari has been granted in *United States* v. *Donovan*, 424 U. S. 907 (1976), a case in which the Solicitor General requests that we dilute even further the standard enunciated in *Kahn* for naming the subjects of proposed surveillance. I fail to comprehend how, in light of the above passage from *Kahn*, the Court can undertake that analysis without concomitantly addressing the contours of the minimization requirement. Inaction can only continue evisceration of the statutory mandate and require that Congress take a further and clearly unnecessary step of enacting more legislation to give concrete content to § 2518 (5).

I would grant the petition for certiorari.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States
of America in the Matter of
an Order Authorizing the
Interception of Oral and Wire
Communications

THOMAS A. FLANNERY, United States Attorney in and for the District of Columbia, being duly sworn deposes and says:

I am familiar with the contents of the Application made by my Assistant Harold J. Sullivan in the instant cause and with the contents of Exhibits "A" and "B" attached thereto, and hereby apply for an Order authorizing the interception of oral and wire communications pursuant to Section 2518 of Title 18 of the United States Code for the telephone facilities listed in the name of Geneva Thornton, 1425 N Street, Northwest, Washington, D. C. commonly used by Bernis Lee Thurmon and carrying telephone number 483-2948.

THOMAS A. FLANNERY
United States Attorney
for the District of Columbia
Washington, D. C.

Subscribed and sworn to before me
this *24th* day of January, 1970
John Lewis Smith, Jr.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in the Matter of an Order Authorizing the Interception of Oral and Wire Communications

APPLICATION

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States has specially designated the Assistant Attorney General for the Criminal Division to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks authorization to intercept wire communications concerning offenses enumerated in Section 2516 of Title 18, United States Code,—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee, Bernis Lee Thurmon, and others.

5. He has discussed all the circumstances of these offenses

with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, which alleges the facts contained in the following paragraphs in order to show that:

A. There is probable cause to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others are conspiring to commit, are committing, and are about to commit offenses involving the importation and sale of narcotics.

B. There is probable cause to believe that wire communications concerning those offenses will be obtained through the intereception authorization which is applied for herein.

C. Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

D. There is probable cause to believe that the telephone facilities are subscribed to by one Geneva Thornton at 1425 N Street, Northwest, Washington, D. C., carrying the telephone number 483-2948 is being used and will be used in connection with the commission of the offenses described above and is commonly used by Bernis Lee Thurmon.

6. No other application for authorization to intercept wire or oral communications from the above-described or any other facilities has been made in connection with the instant investigation.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others, are engaged in the commission of offenses involving the importation and sale of narcotics, that they have used, are using and will use the telephone facilities at 1425 N Street, Northwest, Washington, D. C., in connection with the commission of those offenses; that communications concerning those offenses will be intercepted from that facility; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United

States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the above-described facility for a period of twenty (20) days from the effective date of that order or until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States and the participants and nature of the conspiracy involved therein.

c/cs Harold J. Sullivan
Assistant U.S. Attorney
Washington, D.C.

Subscribed and sworn to before me
this 24th day of January, 1970.
John Lewis Smith, Jr.

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Benjamin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an Order authorizing the interception of wire communications at 1425 N Street, N. W., Apartment #603, Washington, D. C., telephone number 483-2948. The subscriber to number 483-2948 is listed as Geneva Thornton. The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia, and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The period for which interception is sought is twenty (20) days because of the continuing nature of the offenses described below, and because of the particular facts demonstrating such continuing offenses with numerous participants set forth in this affidavit especially in paragraphs 5, 7, and 8.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. license M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged

with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10 1/2" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 148. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881. Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight ounces of heroin and two ounces of cocaine in his possession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby,"

a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmondson Avenue, Baltimore, Maryland. United States Passport #D-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. LeRoy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

4. A special employee of the Bureau of Narcotics and Dangerous Drugs whose information has been checked and verified on numerous occasions by agents of the Bureau of Narcotics and Dangerous Drugs has informed agents of the Bureau of Narcotics and Dangerous Drugs in the Philadelphia area that Donald Leonard Brown has been buying heroin and cocaine from Benjamin Corbin and Irving Hendricks. According to said special employee, Corbin travels overseas to purchase the heroin and cocaine for resale in the United States. A check of passport records indicates that on September 24, 1966, Corbin renewed his passport for the purpose of travelling to Ecuador. Agents of the Bureau of Narcotics and Dangerous Drugs determined by interviewing a Flight Agent of Lufthansa that Corbin did in fact leave the United States for Ecuador. Prior to this time on July 28, 1966, agents of the Bureau of Narcotics and Dangerous Drugs observed Corbin disembark from South America.

In July, 1969, Detective Poggi was told by an informant hereafter known as SE 175 that Frank Scott, also known as "Red" Scott was dealing in narcotics inside the Fantasy Restaurant and was obtaining said drugs from the person who was running the Fantasy Restaurant. SE 175 told Detective Poggi that "Red" Scott had travelled to Puerto Rico on at least one occasion. SE 175 later identified a photograph of Gordon Roger King as the man from whom Scott was receiving narcotics. Records of the Alcohol Beverage Commission reveal that one Gordon Roger King is the Secretary of K. C. Corporation trading as the Fantasy Restaurant.

5. An informant hereafter referred to as SE 54 has advised that the subject "Al" has informed him that he is from New York and came to the District of Columbia area about twelve years ago at which time he went into the illicit narcotic business. "Al" has told SE 54 that although he has been in the illicit narcotics business for many years he has never been apprehended. He attributes this to skillful management of his operation. This operation, according to SE 54, involves great care in selecting purchasers and sellers of narcotics, frequent changes in meeting places, and the use of motorcycles by messengers for deliveries to avoid surveillance by law enforcement officers. SE 54 has participated in conversations with associates of "Al" in which these associates have described the methods by which narcotics are flown from New York into Dulles Airport where they are picked up by "Al's" operators and stashed at a certain place in Virginia.

SE 54 has advised that he became involved in narcotic drug traffic more than a year ago at which time he met the subject known to him as "Al." SE 54 became an employee of said "Al" and was soon selling about several hundred dollars worth of heroin per day. According to SE 54 "Al" brought its orders of narcotics to a location in the vicinity of the Fantasy near 13th and U Streets, N.W., Washington, D. C. On several occasions when SE 54 was picking up its package of narcotics it observed numerous other packages of narcotics upon which were written the names of different persons. Since the narcotics "bust" on August 18, 1969, which resulted in the arrest of approximately 40 persons, "Al" has changed his places of deliver and currently delivers to SE 54 at a location in Northwest Washintgon, hereinafter referred to as location D. In describing the magnitude of "Al's" operation, SE 54 has stated that "Al" as part of his continuing narcotics operation manages the narcotics business of the above-described Frank Scott, also known as "Red" when Scott is out of the country. Furthermore, "Al" has told SE 54 that he frequently goes to New York and Virginia to engage in narcotics transactions. SE 54 has told Detective Merritt that "Al" had told it that he and Gordon King, the owner of Gordies Liquors at 14th and U Streets, N.W., Washington, D. C., and owner of the Fantasy Restaurant were "partners." SE 54 further stated that he had contacted a Negro female bartender at the Fantasy Restaurant, known to him as Bernice, for the purpose of setting up a narcotics transaction with "Al." Records of

the Alcoholic Beverage Commission reveal that the sole owner of National Liquors, commonly referred to as Gordies Liquors, at 2001 14th Street, N.W., Washington, D. C., is one Gordon King. Alcoholic Beverage Commission records further indicate that one Bernice Davis, a Negro female, born on May 4, 1933, is a licensed manager of the Fantasy Restaurant. Members of both the Bureau of Narcotics and Dangerous Drugs and Metropolitan Police Department Narcotics Section have made undercover buys of narcotics in the Fantasy Restaurant. SE 54 states that "Al" is the principal lieutenant to Scott and is in charge of all narcotic dealing in the area of 12th and U Streets, N.W., Washington, D. C. SE 54 also states that there is a silent partner who is the top man in the operation. All means of investigation employed so far have failed to reveal the identity of this silent partner. SE 54 also states that Scott and "Al" have their own factory where they "cut" pure heroin. He has seen "Al" on one occasion carrying a bag containing more than three kilos of white powder which "Al" said was pure heroin. All means of investigation employed so far have failed to reveal the location of this factory.

6. The above informant has further advised that "Al" is one of the largest dealers of narcotics in the Washington, D. C. area, and that informant's services could assist in initiating a case against "Al." The above informant's reliability has been proven in the past. Specifically, on two occasions, his information has directly resulted in arrests of subjects for violations of the Harrison Narcotics Act. Other information concerning narcotics traffic in Washington from SE 54 has been checked and verified by members of the Metropolitan Police Department.

7. On or about September 3, 1969, SE 54 told Officer William J. Merritt of the Narcotic Section of the Metropolitan Police Department that it could arrange to buy narcotics from "Al." SE 54 further stated that it could make such arrangements by calling the telephone number 244-7054.

On or about September 11, 1969, SE 54 called the above number and spoke to "Al" and arranged to have a wholesale quantity of heroin delivered to it at Location D. This call was monitored by Detective Merritt with the permission of SE 54.

A surveillance was placed on 5195 Linnean Terrace, S.W., and at about 6:20 p.m. the officers conducting the surveil-

lance observed a Negro male leave the above premises riding a motorcycle (D. C. Tags M 2806). D. C. Tag M 2806 is listed to Benjamin Thornton of 1425 M Street, N.W., Apartment 603. It will be recalled that "Benjamin Thornton" is an alias used by Bernis Lee Thurman described above. At about 6:25 p.m. the same Negro male arrived at Location D and sold the previously agreed upon wholesale quantity of heroin to SE 54. The person selling the heroin was identified by SE 54 as "Al." This sale was observed by Detective Merritt. The chemist's analysis showed that the package sold to SE 54 contained 6.2 per cent pure heroin.

8. On or about Wednesday, September 17, 1969, SE 54 again dialed 244-7054, in the presence of Detective G. A. Brandani, who monitored the call with SE 54's permission. "Al" answered the phone and received SE 54's order for another wholesale quantity of heroin. "Al" told SE 54 to proceed to the same location D. At 11:28 a.m. the officer conducting surveillance of the Linnean Terrace, N.W. address observed two motorcycles leave from the rear of the Linnean Terrace, N.W. address. At approximately 12:25 p.m. on the same day, Detective Tribby who was conducting surveillance at Location D observed two motorcycles arrive. Thereafter SE 54 purchased the previously agreed upon wholesale quantity of 7.2 per cent pure heroin from the subjects. SE 54 later identified the Negro male operating the motorcycle bearing D. C. Tags M 2806 as "Al." He also later identified the other Negro male by photograph as "Al's" right hand man, Bernis Lee Thurman, Police Department I. D. Bureau #190-647. Thurmon has been identified by the resident manager of 1425 N Street, N.W., as the same person she knows as Benjamin Thornton, who rents Apartment 603 at that address. Benjamin Thornton is the subject to whom motorcycle M 2806 is listed which motorcycle is operated by "Al."

9. On the morning of December 17, 1969, Detectives Robert Tribby and Gabriel Brandani observed a late model automobile, District of Columbia Tag #748-879 arrive at 5195 Linnean Terrace, N.W. A white male departed from the car and delivered a package to a Negro male at 5195 Linnean Terrace, N.W. A photograph was taken by the detectives and the male who received the package was later identified by SE 54 from the photograph as "Al." Investigation revealed that the late model automobile described

above is registered to D & M Corporation, T. L. Higgers Drugs, 5015 Connecticut Avenue, N.W. The pharmacist at Higgers Drugs informed Detective McKennon that a delivery of two pounds of "lactose" otherwise known as milk sugar, had been made to 5195 Linnean Terrace, N.W., on the morning of December 17, 1969, pursuant to a request from a Mrs. Lee. The pharmacist stated that this was an uncommon request and that he had to order the product specially for Mrs. Lee. "Lactose" is a product commonly used to dilute pure heroin. Two pounds of lactose could be used to "cut" pure heroin into 17,000 capsules for street sale.

10. Further information has been received by Detectives Merritt and Poggi of the Metropolitan Police Department from Special Employee #144, an informant whose information has contributed to the arrests of narcotics violators, that said Special Employee has purchased heroin and cocaine from a man named "Bernie," who lives at 1425 N Street, N.W., Apartment 603, as late as Jan. 14, 1970. Said Special Employee has identified a photograph of Bernis Lee Thurmon as the "Bernie" who lives at 1425 N Street, N.W. SE 144 has informed Detectives Merritt and Poggi that "Bernie" keeps hundreds of capsules of heroin on his person for customers who come to his apartment, and that he and an associate named "Al" frequently operate motorcycles. SE 144 has told members of the Metropolitan Police Department that "Al" and one Gordie King are two of the biggest narcotic traffickers in the District of Columbia. According to SE 144, King travels to Puerto Rico and Bahamas. King told SE 144 that on one of his trips he gave a party at which he supplied several thousand dollars worth of cocaine. SE 144 does not know where "Al" obtains his narcotics but thinks that he transacts at least some of his business in Atlantic City, New Jersey. "Al" told SE 144 that he had wrecked his automobile in Atlantic City in mid-November. This same information regarding the wrecked automobile had previously been received from SE 54.

The subjects "Al" and Thurmon have been observed on numerous occasions by members of the Metropolitan Police Department, Narcotic Section, at 1425 N Street, N.W., and also at 5195 Linnean Terrace, N.W.

11. Records of the C & P Telephone Company obtained by subpoena indicate that the above 202-244-7027 was used on May 22, 23, 27, 28, June 1, 19, 24, July 9, and 26, 1969, to

call the number 609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company reflect that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5383, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York, and Philadelphia.

On November 19 and 21 and on December 10, 1969, the telephone number 244-7027, was used to call the number 609-345-7332, in Atlantic City, New Jersey. This number is listed to Ike's Liquor Store, which is owned by Issac Boswell Nicholson, described by the Federal Bureau of Investigation as the "number two man" in the numbers racket in Atlantic City. Nicholson has been arrested on numerous occasions for gambling violations.

On November 19, 1969, the telephone number 244-7027 was twice used to call the number 609-344-1657, which is listed to Frank Stewart, described by the Federal Bureau of Investigation as being involved in narcotics, prostitution and gambling. Stewart owns a bar which, according to the Federal Bureau of Investigation, is used for illegal narcotic transactions.

On November 21, December 8, and 10, 1969, the number 244-7027 was used to call the number 609-344-5919 listed in the Atlantic City, New Jersey, directory to Mamie Jones. The sister of Mamie Jones is one "Toody" Kirkland alleged to be a member of the Kirkland Brothers gang which, according to the Federal Bureau of Investigation, is involved in narcotics, gambling, and other criminal activities. The Federal Bureau of Investigation also reports that Mamie Jones is an associate of Maynard Francis Hayes, a suspected forger and narcotics violator. The number 609-344-5919 was also called from the number 244-7054 on November 26, 1969.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the

time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N.W., in a wrecked condition.

10. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, N.W. When driving on his motorcycle he is constantly alert for surveillance.

10a. On January 12, 1970, Alphonso H. Lee was shot in the leg. Shortly thereafter SE 54 learned that Mrs. Teri A. Lee had temporarily taken over the management of "Al's" business and that for the time being SE 54 should make his orders by calling the number 483-2948. The subscriber is listed as Geneva Thornton at 1425 N Street, Northwest, Apartment #603. After learning this SE 54 called the above number and spoke with Bernis Lee Thurmon, a/k/a Benjamin Thornton. SE 54 ordered a large quantity of narcotics from Thurmon which was delivered to it in the Northwest section of the District of Columbia.

11. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

12. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

13. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, also known as "Al" and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington,

D.C. in this District and within the jurisdiction of this Court; that affiant further believes that probable cause exists to believe that Bernis Lee Thurmon and others in the Alphonso H. Lee operation described above are enagged in the commission of an offense involving the importation of narcotics, and conspiracy to do so; that Bernis Lee Thurmon operates at 1425 N Street, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he has used and will continue to use the telephone numbered 483-2948 at this address, in connection with the commisison of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to install a pen register, dialing recorder and to intercept wire communications from the number 483-2948 at 1425 N Street, Northwest, Washington, D.C., for a period of twenty (20) days from the effective date of the order.

GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this 24th day of January, 1970.
10:30 A.M.
John Lewis Smith, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States
of America in the Matter of an
Order Authorizing the Interception
of Wire Communications — No.

ORDER

AUTHORIZING INTERCEPTION OF WIRE COMMUNICATION

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative and law enforcement officers as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Alphonso H. Lee also known as "Al," Bernis Lee Thurmon, and others are presently operating from 1425 N Street, Northwest, Washington, D. C., within this District, are committing and are about to commit and are conspiring with other persons to commit offenses set forth in Section 2516 of Title 18, to wit: the importation and transportation of narcotics in violation of Section 174 of Title 21 of the United States Code.

(b) There is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications, authorization for which the attached application has been made. In particular, these wire communications will concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and

the illicit destination of these narcotic drugs in this jurisdiction.

(c) All normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining the above information.

(d) There is probable cause to believe that the telephone facilities at 1425 N Street, Northwest, Washington, D. C., listed to Geneva Thornton and carrying the telephone number 483-2948 is being used and is about to be used in connection with the commission of the above-described offenses and is commonly used by Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, and others.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, who has been specially designated by the Attorney General of the United States to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to: Intercept the wire communications of Alphonso H. Lee, Bernis Lee Thurmon, and other persons as may make use of the facilities hereinbefore described.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications that are otherwise subject to interception under Chapter 119 of Title 18 of United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days from date.

PROVIDING ALSO, that Harold J. Sullivan shall provide the Court with a report detailing the progress of the interception and the nature of the communication intercepted on the 5th, 10th, 15th, 20th, and 25th day following the date of this Order.

J. Lewis Smith, Jr.
Judge
U.S. District Judge for D.C.

1/24/70 10:30 A.M.
Date

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

To : John Lewis Smith, Judge
United States District Court
for the District of Columbia
Date: Jan. 29, 1970

From : Harold J. Sullivan
Chief, Major Crimes Unit

Subject: Intercept of January 24, 1970

The intercept as 1425 N Street, Northwest, Apartment 603, phone number 483-2948, was connected on Saturday, January 24, 1970, at approximately 8:00 p.m. No communications were intercepted until 1:45 p.m. on Sunday, January 25, 1970, after the subject, Bernis Thurmon, was seen entering the premises. Between 1:45 p.m. on January 25, 1970, and 10:48 p.m., January 25, 1970, there were a total of 17 communications recorded. Eight of these involved narcotics transactions between various individuals, at phones other than that above, and a person who identified himself as "Joe" and a person who identified himself as "Bern" or "Bernie" at the telephone numbered 483-2948.

There were no calls recorded between 10:48 p.m. on January 25, 1970, and 8:00 a.m. January 26, 1970. From 8:00 a.m., January 26, 1970 until 8:00 a.m. January 27, 1970, a total of 19 telephone communications were recorded, five of which involved narcotics or narcotics transactions.*

It should be noted that at 6:49 p.m. on January 25, 1970, a male who identified himself as "Red" called to arrange a meeting. This individual may be the subject Frank Scott also known as "Red" named in the affidavit in support of the intercept. It should also be noted that on January 26, 1970, at 5:48 p.m., in a conversation between a female who identified herself as Geneva and "Bernie," reference was made to the "54" number. The telephones at the Linnean Terrace address referred to in the affidavit are 244-7054 and 244-7027.

On January 27, 1970, at 6:25 p.m. Geneva called Freedman's Hospital, Ward 6, where Alphonso H. Lee has been staying since he was shot.

* From 8:00 a.m., January 27, 1970, until 8:00 a.m. January 28, 1970, a total of 13 conversations were recorded two of which involved narcotics or narcotic transactions.

On January 28, 1970, at "Al" called "Bernie" at 483-2948, and talked about $1985 that Bernie owed "Al." Alphonso H. Lee left Freedman's Hospital on the evening of January 27, 1970.

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

To : John Lewis Smith, Judge
United States District Court
for the District of Columbia

Date: Feb. 3, 1970

From : Harold J. Sullivan
Chief, Major Crimes Unit

Subject: Intercept of January 24, 1970

Since 8:00 a.m. on January 29, 1970, the following developments have occurred in connection with the intercept at 1425 N Street, Northwest, Apartment 603.

Between the period 8:00 a.m. on January 29, 1970, and 8:00 a.m. on January 30, 1970, a total of 18 conversations were intercepted and recorded. Of these 18 conversations, 6 were related to narcotics or narcotic transactions.

Between the period 8:00 a.m. on January 30 and 8:00 a.m. on January 31, 1970, 12 conversations were recorded, of which 7 were related to narcotics or narcotic transactions.

Between the period 8:00 a.m. on January 31 until 8:00 a.m. on February 1, 1970, a total of 14 conversations were recorded of which 6 were related to narcotics or narcotic transactions.

Between 8:00 a.m. on February 1, 1970, and 8:00 a.m. on February 2, 1970, a total of 6 conversations were recorded 3 of which were related to narcotics.

It should be noted that on January 30, 1970, a male who identified himself as "Bernie" called 638-2521, listed to Alan Cole at 1230 - 13th Street, Northwest, Apartment 518. This number was listed by Teri A. Lee as her address when she opened a bank account at Riggs National Bank of Washington. On January 30, 1970, a male who identified himself as Al called the intercepted number twice and during one call asked for Bernie and left the message that he could be reached at the "5-4" number. It should also be noted that on January 31, 1970, Bernie called a female whom he identified as "Liz" at the Delaware number 302-737-8740. Liz said that she was planning a trip to Washington with another female (a code word for cocaine).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in the Matter of an Order Authorizing the Interception of Wire Communications	Application

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the intereception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks authorization to intercept wire communications concerning offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee and others.

5. He has discussed all the circumstances of these offenses

with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, and incorporated by reference herein, which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Alphonso H. Lee, also known as "Al," and unknown others have committed, are committing, and are about to commit offenses involving the importation and sale of narcotics, in violation of 21 U.S.C. 174 and are conspiring to commit the aforesaid offenses in violation of 18 U.S.C. 371.

(b) there is probable cause to believe that wire communications of Alphonso H. Lee, also known as "Al," and unknown others, concerning those offenses will be obtained through the interception of wire communications. In particular, these wire communications will be between Alphonso H. Lee and his suppliers concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Alphonso H. Lee, and (2) the price Alphonso H. Lee is to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Alphonso H. Lee and his buyers concerning: (1) the date, time, place, and manner in which Alphonso H. Lee will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers and (2) the price Alphonso H. Lee is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are to dangerous to be used.

(d) there is probable cause to believe that the two telephones subscribed to by one Teri A. Lee at 5195 Linnean Terrace, Northwest, Washington, D. C., a private residence, and carrying the telephone numbers 244-7027 and 244-7054, respectively, are being used and will be used in connection with the commission of the offenses described above and are commonly used by Alphonso H. Lee, also known as "Al."

6. On January 24, 1970, an application made by affiant and the affidavit of Special Agent Glennon L. Cooper of the

District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs, in support of said application were submitted to the Honorable John Lewis Smith, United States District Judge, District of Columbia, for a court order authorizing the Bureau of Narcotics and Dangerous Drugs to intercept wire communications for a twenty (20) day period to and from telephone number 483-2948 subscribed to by Geneva Thornton and located at Apartment #603, 1425 N Street, N. W., Washington, D. C., in connection with the investigation into possible violations of 21 U.S.C. 174 and 18 U.S.C. 371 by Bernis Lee Thurmon and others. On the basis of said application and affidavit, Judge Smith issued an order dated January 20, 1970, authorizing said interceptions for a period of twenty (20) days from the date of the order. The nature of some of these intercepted communications are set forth in the attached affidavit (Exhibit B) of Special Agent Glennon L. Cooper. Affiant attaches hereto, marked Exhibits C, D, and E, respectively, a copy of the above-described application, affidavit, and order on the basis that the information set forth in such documents is relevant and relates to the illegal narcotic activities being conducted by Alphonso H. Lee and unknown others on the above-described two telephones which are the subject of the present application.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee and unknown others, are engaged in the commission of offenses involving the importation and sale of narcotics and a conspiracy to do so; that they have used, are using, and will use the above-described two telephones at 5195 Linnean Terrace, Northwest, Washington, D. C., in connection with the commission of those offenses; that communications concerning those offenses will be intercepted from the above-described two telephones; and that normal investigative procedures reasonably appear to be unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the above-described two telephones until communications are intercepted which reveal the details of the scheme which has been used by

Alphonso H. Lee and unknown others to transport, receive, conceal, and sell illegal narcotic drugs, and the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of the order, whichever is earlier.

HAROLD J. SULLIVAN
Assistant United States Attorney
Washington, D. C.

Subscribed and sworn to before
me this 4th day of February, 1970.

John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE MISC. NO. 11-70

This is to certify that the attached affidavit is a true copy of the original affidavit which I signed before Judge John Lewis Smith on February 4, 1970. Judge Smith also signed the original affidavit in my presence at that time.

GLENNON L. COOPER
Special Agent
Bureau of Narcotics and
Dangerous Drugs

Subscribed and sworn to before me this 6th day of May, 1970.

Joyce M. Swanson
Notary Public
My commission expires Feb. 28, 1973

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Benjamin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an Order authorizing the interception of wire communications at 5195 Linnean Terrace, N.W., Washington, D. C. telephone numbers 244-7054 and 244-7027. The premises at 5195 Linnean Terrace, N.W., are rented in the name of Mrs. Teri A. Lee, also known as Mrs. Alphonso H. Lee. The two telephones located at the above address are billed to Teri A. Lee. The number 244-7027 is listed in the C & P telephone book under the names of Teri A. Lee, Alphonso H. Lee and Steve Lee. The number 244-7054 is unlisted. The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The period for which interception is sought is thirty days because of the continuing nature of the offenses described below, and because of the particular facts demonstrating such continuing offenses with numerous participants set forth in this affidavit especially in paragraphs 5, 7 and 8.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. License M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and

weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10½" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 143. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881, Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight ounces of heroin and two ounces of cocaine in his posession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby," a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmondson Avenue, Baltimore, Maryland. United States Passport #-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. Leroy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

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609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company indicate that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5363, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York and Philadelphia. These toll records will be updated by a further affidavit.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N.W., in a wrecked condition.

12. On January 12, 1970, Alphonso Lee was admitted to Freedman's Hospital in the District of Columbia with bullet wounds to his leg, where he was hospitalized until January 28, 1970. On January 24, 1970, a court authorized intercept of telephone 483-2948 listed to Geneva Thornton at 1425 N

Street, Northwest, Apartment 603, Washington, D. C. was begun. The intercept revealed regular narcotic traffic by Bernis Lee Thurmon, also known as Benjamin Thornton, aforementioned as a known Alphonso Lee associate. Narcotics dealings have averaged seven per day in one ounce quantities for approximately $300.00 per ounce for mixed heroin. Orders for narcotics are telephoned to Thurmon; he then leaves his apartment and makes deliveries. In addition, the intercept, surveillances, and other source information further indicate that Alphonso Lee continues to deal in narcotics and that the telephone numbers 244-7027 and 244-7054 listed to Mrs. Teri A. Lee, 5195 Linnean Terrace, Northwest, Washington, D. C. continue to be used in Lee's narcotic operation. The following is a digest of this recent information:

A) On January 25, 1970, Alphonso Lee called Bernis Thurmon at 483-2948 and asked Bernis to send his gun over to him (A1). Bernis replied that he did not want to be "by there" to see him. Alphonso stated that Bernis owed him $300; Bernis claimed it was only $150.

B) On January 26, 1970, Geneva Thornton called "Ben" on two occasions at 244-7027, one of Alphonso Lee's numbers. "Ben" mentioned during the second call that another party was on the "5-4" number.

C) On January 28, 1970, an unidentified male called Bernis at 483-2948 and discussed money and narcotics. Bernis expressed a desire to get his money straightened out.

D) On January 29, 1970, at 1:18 p.m. officers of the Metropolitan Police Department observed a 1970 yellow Dodge Charger proceed to 1230 - 13th Street, N.W., driven by Alphonso Lee. Alphonso Lee, the only occupant, was seen to get out of the car and go to a public phone booth where he appeared to place a call. He returned to his car, and shortly thereafter a Negro male came out of 1230 - 13th Street, Northwest, and entered the same auto and conversed with Alphonso Lee. Then the Negro male left the car and went back into 1230 - 13th Street, N.W. Alphonso Lee then drove to and had conversations with a number of Negro males who came to his car. The vicinity of 14th and S Streets, Northwest is a known area of high narcotic violation in the District of Columbia.

E) On January 29, 1970, at approximately 4:13 p.m. Bernis called an unidentified male at 638-2521. The male told Bernis to come over in about 10 - 15 minutes, they would meet "down" (stairs).

F) On January 29, 1970, at about 4:25 p.m. officers of the Metropolitan Police Department began surveillance at 1230 - 13th Street, Northwest. At about 4:30 p.m. a blue, late-model Lincoln with two occupants was observed parked in an alley next to 1230 - 13th Street, Northwest. The subject Bernis Lee Thurmon has been previously observed driving an automobile of this description. An officer approached the parked automobile and observed Thurmon seated in the drivers seat and a Negro male in the front passenger seat. The two men were seen transferring a bundle of money, approximately four inches high, bills wrapped with rubber bands or string. After the transfer, the subject in the passenger seat was seen leave the Lincoln and enter 1230 - 13th Street, Northwest, where he boarded an elevator. An officer who conducted the surveillance of Alphonso Lee earlier in the day conducted this second surveillance and identified the Negro male who met with Thurmon as the same one who had earlier met with Lee.

G) In addition to the above conversations and surveillances, SE 54 states on at least one occasion since Alphonso Lee has been released from the hospital, Alphonso Lee arranged a sale of narcotics over telephone number 244-7054. SE 54 was present when this transaction was arranged.

H) A different source of information who has provided information in the past which has led to the recovery of narcotics on over five occasions states that it has personal knowledge that Alphonso Lee has continued to deal in narcotics both during his stay at Freedman's Hospital, and since his release. The source described "Bernie," Bernis Thurmon, as Alphonso Lee's delivery man.

13. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, Northwest. When driving on his motorcycle he is constantly alert for surveillance.

14. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

15. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of

Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

16. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation, with the exception of the aforementioned court authorized intercept of telephone number 483-2948.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, also known as "Al" and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he and other persons have used and will continue to use the telephones numbered 244-7054 and 244-7027 at this address, in connection with the commission of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to install a pen register, dialing recorder and to intercept wire communications from the numbers 244-7054 and 244-7027 at 5195 Linnean Terrace, Northwest, Washington, D. C., for a period of twenty (20) days from the effective date of the order.

GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this ..... day of

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS	No.

ORDER

AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon sworn application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative and law enforcement officers as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Alphonso H. Lee, also known as "Al," and unknown others have committed, are committing, and are about to commit offenses involving the importation and sale of narcotics, in violation of 21 U.S.C. 174 and are conspiring to commit the aforesaid offenses in violation of 18 U.S.C. 371.

(b) there is probable cause to believe that wire communications of Alphonso H. Lee, also known as "Al," and unknown others, concerning those offenses will be obtained through the interception of wire communications. In particular, these wire communications will be between Alphonso H. Lee and his suppliers concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Alphonso H. Lee, and (2) the price Alphonso H. Lee is

to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Alphonso H. Lee and his buyers concerning: (1) the date, time, place, and manner in which Alphonso H. Lee will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers and (2) the price Alphonso H. Lee is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the two telephones subscribed to by one Teri A. Lee at 5195 Linnean Terrace, Northwest, Washintgon, D. C., a private residence, and carrying the telephone numbers 244-7027 and 244-7054, respectively, are being used and will be used in connection with the commission of the offenses described above and are commonly used by Alphonso H. Lee, also known as "Al."

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of Alphonso H. Lee, also known as "Al," and unknown others concerning the above-described offenses to and from the two telephones subscribed to by Teri A. Lee and located at 5195 Linnean Terrace, Northwest, Washington, D. C. a private residence, and bearing telephone numbers 244-7027 and 244-7054, respectively.

(b) such interceptions shall not automatically terminate when the type of communications described above in paragraph (b) have first been obtained, but shall continue until communications are intercepted which

reveal the details of the scheme which has been used by Alphonso H. Lee and unknown others to transport, receive, conceal, and sell illegal narcotic drugs, and the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be exectued as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of twenty (20) days from the date of this Order.

PROVIDING ALSO, that Harold J. Sullivan shall provide the court with a report on the 5th, 10th, and 15th day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/John Lewis Smith, Jr.
Judge

Date: 2/4/70

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

TO : Judge John Lewis Smith
United States District Court
for the District of Columbia

DATE: Feb. 8, 1970

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT: Intercept of January 24, 1970

Between February 2, 1970, at 8:00 a.m. and February 7, 1970, at 8:00 a.m. the following developments occurred in connection with the intercept at 1425 N Street, Northwest, Apartment 603:

During the period from 8:00 a.m. February 2, 1970, through 8:00 a.m. February 3, 1970, a total of 13 calls were intercepted. Of these 13 calls, 8 were either related to narcotics or to the alleged conspiracy.

During the period from 8:00 a.m. February 3 through 8:00 a.m. February 4, a total of 15 conversations were intercepted. Six of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. February 4, until 8:00 a.m. February 5, a total of 17 conversations were intercepted. Seven of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. on February 5 until 8:00 a.m. February 6, a total of 6 calls were intercepted. Three of these conversations concerned narcotics or narcotic transactions.

During the period from February 6 at 8:00 a.m. until 8:00 a.m. February 7 a total of 21 conversations were intercepted. Seven of these conversations concerned narcotics or narcotic transactions.

It should be noted that on February 3 at 1:16 p.m. a male who identified himself as Norman called Bernie and asked if he could get one. Bernie said that he would meet Norman at the joint. Shortly thereafter, officer West of the MPD observed Bernie meet an unknown Negro male in the Fantasy Restaurant, 1355 U Street, Northwest. Both subjects went into the men's room at the Fantasy and were observed leaving about two minutes later.

Also, on February 3 at 10:06 p.m., a female who identified herself as Grace called Bernie and during their conversation stated that she had a friend who had a thing which would take ten (slang for dilution of narcotics) for $1,000. She said she had not called Bernie before because she did not think that he was on his own. Bernie replied that he was on his own. She asked how Al was doing.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS	APPLICATION

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of a request for an extension of the order of January 24, 1970, authorizing the interception of wire communications at 1425 N Street, N. W., Apartment 603, Washington, D. C., telephone number 483-2948. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division, the Honorable Will Wilson, to authorize affiant to make application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks an extension of the order of January 24, 1970, authorizing the interception of wire communications of Bernis Lee Thurmon and others concerning

offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee, Bernis Lee Thurmon, and others.

5. He has discussed all the circumstances of these offenses with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, which alleges the facts contained in the following paragraphs in order to show that:

(a) there is probable cause to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others are conspiring to commit, are committing, and are about to commit offenses involving the importation and sale of narcotics.

(b) there is probable cause to believe that wire communications concerning those offenses will be obtained through the interception, authorization for which is applied for herein. In particular, these wire communications will concern the details of the scheme used to smuggle narcotics into the United States, the method of delivery of these narcotic drugs to this area, and the participants and the nature of the conspiracy involved therein.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to belive that the telephone subscribed to by one Geneva Thornton at Apartment 603, 1425 N Street, N. W., Washington, D. C., carrying the telephone number 483-2948 is being used and will be used in connection with the commission of the offenses described above and is commonly used by Bernis Lee Thurmon.

6. On January 24, 1970, Judge John Lewis Smith, United States District Judge, District of Columbia, issued an order authorizing the interception of wire communications for a twenty (20) day period to and from telephone number 483-2948 located at 1425 N Street, N. W., Apartment 603, Washington, D. C. This is the telephone facility for which the

extension is requested. On February 4, 1970, Judge John Lewis Smith issued an order authorizing the interception of wire communications for a twenty (20) day period to and from telephone numbers 244-7027 and 244-8054 subscribed to by Teri A. Lee and located at 5195 Linnean Terrace, N. W., Washington, D. C. No other applications have been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, telephones, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Bernis Lee Thurmon and others, are engaged in the commission of offenses involving the importation and sale of narcotics, that they have used, are using, and will use the telephone located at Apartment 603, 1425 N Street, N. W., Washington, D. C., in connection with the commission of these offenses, that communications concerning those offenses will be intercepted from that telephone and that no other investigative procedure appears likely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to continue to intercept wire communications from the above-described telephone until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States, the method of delivery of these narcotic drugs to this area, the sale of these narcotic drugs in this area, and the participants and the nature of the conspiracy involved therein, or for a period of eleven (11) days from the date of that order, whichever is earlier.

/s/ Harold J. Sullivan
HAROLD J. SULLIVAN
Assistant United States Attorney
Washington, D. C.

Subscribed and sworn to before me
this 10th day of January, 1970.

/s/ John Lewis Smith, Jr.
United States District Judge

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Bneajmin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an extension of the Order by this Court on January 24, 1970, authorizing the interception of wire communications at 1425 N Street, Northwest, Apartment 603, Washington, D. C., telephone number 483-2948, through February 13, 1970. The period of time for which the extension is requested is eleven (11) days until February 23, 1970, to coincide with the termination of the order of the Court, authorizing the interception of wire communications from the telephone numbers 244-7054 and 244-7027, listed to Teri A. Lee, in connection with the same alleged conspiracy. The type of communications sought to be intercepted pursuant to the above orders are conversations among individuals in New York, New Jersey, Philadelphia, Virginia and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The type of communications sought to be intercepted during the period of extension, if it is granted, are the same as above with particular emphasis upon conversations which are expected to provide a more complete identification of the principals involved in the conspiracy to import the narcotics into the United States and transport them to the District of Columbia, their precise roles in the conspiracy and the method by which the narcotics are actually brought into the District. The period for which interception has been presently approved is twenty days from January 24, 1970, or upon attainment of the authorized objective whichever first occurs. The authorized objectives have not yet been obtained and the twenty day period expires on Friday, February 13, 1970.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. license M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10½" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 148. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881, Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight

ounces of heroin and two ounces of cocaine in his possession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby," a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmonson Avenue, Baltimore, Maryland. United States Passport #D-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. LeRoy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

4. Bernis Thurmon has been the subject of a continuing investigation by the Metropolitan Police Department since September, 1969, and by the Bureau of Narcotics and Dangerous Drugs since December, 1969.

A special employee of the Bureau of Narcotics and Dangerous Drugs whose information has been checked and verified on numerous occasions by agents of the Bureau of Narcotics and Dangerous Drugs has informed agents of the Bureau of Narcotics and Dangerous Drugs in the Philadelphia area that Donald Leonard Brown has been buying heroin and cocaine for resale in the United States. A check of passport records indicates that on September 24, 1966, Corbin renewed his passport for the purpose of travelling to Ecuador. Agents of the Bureau of Narcotics and Dangerous Drugs determined by interviewing a Flight Agent of Lufthansa that Corbin did in fact leave the United States for Ecuador. Prior to this time on July 28, 1966, agents of the Bureau of Narcotics and Dangerous Drugs observed Corbin disembark from South America.

In July, 1969, Detective Poggi was told by an informant hereafter known as SE 175 that Frank Scott, also known as "Red" Scott was dealing in narcotics inside the Fantasy Restaurant and was obtaining said drugs from the person

who was running the Fantasy Restaurant. SE 175 told Detective Poggi that "Red" Scott had travelled to Puerto Rico on at least one occasion. SE 175 later identified a photograph of Gordon Roger King as the man from whom Scott was receiving narcotics. Records of the Alcohol Beverage Commission reveal that one Gordon Roger King is the Secretary of K. C. Corporation trading as the Fantasy Restaurant.

5. An informant hereafter referred to as SE 54 has advised that the subject "Al" has informed him that he is from New York and came to the District of Columbia area about twelve years ago at which time he went into the illicit narcotic business. "Al" has told SE 54 that although he has been in the illicit narcotics business for many years he has never been apprehended. He attributes this to skillful management of his operation. This operation, according to SE 54, involves great care in selecting purchasers and sellers of narcotics, frequent changes in meeting places, and the use of motorcycles by messengers for deliveries to avoid surveillance by law enforcement officers. SE 54 has participated in conversations with associates of "Al" in which these associates have described the methods by which narcotics are flown from New York into Dulles Airport where they are picked up by "Al's" operators and stashed at a certain place in Virginia.

SE 54 has advised that he became involved in narcotic drug traffic more than a year ago at which time he met the subject known to him as "Al." SE 54 became an employee of said "Al" and was soon selling about several hundred dollars worth of heroin per day. According to SE 54 "Al" brought its orders of narcotics to a location in the vicinity of the Fantasy near 14th and U Streets, N.W., Washington, D. C. On several occasions when SE 54 was picking up its package of narcotics it observed numerous other packages of narcotics upon which were written the names of different persons. Sinse the narcotics "bust" on August 18, 1969, which resulted in the arrest of approximately 40 persons, "Al" has changed his place of delivery and currently delivers to SE 54 at a location in Northwest Washington, hereinafter referred to as location D. In describing the magnitude of "Al's" operation, SE 54 has stated that "Al" as part of his continuing narcotics operation manages the narcotics business of the above-described Frank Scott, also known as "Red" when Scott is out of the country. Furthermore, "Al" has told SE 54 that he frequently goes to New

York and Virginia to engage in narcotics transactions. SE 54 has told Detective Merritt that "Al" had told it that he and Gordon King, the owner of Gordies Liquors at 14th and U Street, N.W., Washington, D. C., and owner of the Fantasy Restaurant were "partners." SE 54 further stated that he had contacted a Negro female bartender at the Fantasy Restaurant, known to him as Bernice, for the purpose of setting up a narcotics transaction with "Al." Records of the Alcoholic Beverage Commission reveal that the sole owner of National Liquors, commonly referred to as Gordies Liquors, at 2001 14th Street, N.W., Washington, D. C., is one Gordon King. Alcoholic Beverage Commission records further indicate that one Bernice Davis, a Negro female, born on May 4, 1933, is a licensed manager of the Fantasy Restaurant. Members of both the Bureau of Narcotics and Dangerous Drugs and Metropolitan Police Department Narcotics Section have made undercover buys of narcotics in the Fantasy Restaurant. SE 54 states that "Al" is the principal lieutenant to Scott and is in charge of all narcotic dealing in the area of 12th and U Streets, N.W., Washington, D. C. SE 54 also states that there is a silent partner who is the top man in the operation. All means of investigation employed so far have failed to reveal the identity of this silent partner. SE 54 also states that Scott and "Al" have their own factory where they "cut" pure heroin. He has seen "Al" on one occasion carrying a bag containing more than three kilos of white powder which "Al" said was pure heroin. All means of investigation employed so far have failed to reveal the location of this factory.

6. The above informant has further advised that "Al" is one of the largest dealers of narcotics in the Washington, D. C. area, and that informant's services could assist in initiating a case against "Al." The above informant's reliability has been proven in the past. Specifically, on two occasions, his information has directly resulted in arrests of subjects for violation of the Harrison Narcotics Act. Other information concerning narcotics traffic in Washington from SE 54 has been checked and verified by members of the Metropolitan Police Department.

7. On or about September 3, 1969, SE 54 told Officer William J. Merritt of the Narcotic Section of the Metropolitan Police Department that it could arrange to buy narcotics from "Al." SE 54 further stated that it could

make such arrangements by calling the telephone number 244-7054.

On or about September 11, 1969, SE 54 called the above number and spoke to "Al" and arranged to have a wholesale quantity of heroin delivered to it at Location D. This call was monitored by Detective Merritt with the permission of SE 54.

A surveillance was placed on 5195 Linnean Terrace, N.W., and at about 6:20 p.m. the officers conducting the surveillance observed a Negro male leave the above premises riding a motorcycle (D. C. Tags M 2806). D. C. Tag M 2806 is listed to Benjamin Thornton of 1425 N Street, N.W., Apartment 603. It will be recalled that "Benjamin Thornton" is an alias used by Bernis Lee Thurmon described above. At about 6:25 p.m. the same Negro male arrived at Location D and sold the previously agreed upon wholesale quantity of heroin to SE 54. The person selling the heroin was identified by SE 54 as "Al." This sale was observed by Detective Merritt. The chemist's analysis showed that the package sold to SE 54 contained 6.2 per cent pure heroin.

8. On or about Wednesday, September 17, 1969, SE 54 again dialed 244-7054, in the presence of Detective G. A. Brandani, who monitored the call with SE 54's permission. "Al" answered the phone and received SE 54's order for another wholesale quantity of heroin. "Al" told SE 54 to proceed to the same location D. At 11:28 a.m. the officer conducting surveillance of the Linnean Terrace, N.W. address observed two motorcycles leave from the rear of the Linnean Terrace, N.W. address. At approximately 12:25 p.m. on the same day, Detective Tribby who was conducting surveillance at Location D observed two motorcycles arrive. Thereafter SE 54 purchased the previously agreed upon wholesale qauntity of 7.2 per cent pure heroin from the subjects. SE 54 later identified the Negro male operating the motorcycle bearing D. C. Tags M 2806 as "Al." He also later identified the other Negro male by photograph as "Al's" right hand man, Bernis Lee Thurman, Police Department I. D. Bureau #190-647. Thurmon has been identified by the resident manager of 1425 N Street N.W., as the same person she knows as Benjamin Thornton, who rents Apartment 603 at that address. Benjamin Thornton is the subject to whom motorcycle M 2806 is listed which motorcycle is operated by "Al."

9. On the morning of December 17, 1969, Detectives

Robert Tribby and Gabriel Brandani observed a late model automobile, District of Columbia Tag #748-879 arrive at 5195 Linnean Terrace, N.W. A white male departed from the car and delivered a package to a Negro male at 5195 Linnean Terrace, N.W. A photograph was taken by the detectives and the male who received the package was later identified by SE 54 from the photograph as "Al." Investigation revealed that the late model automobile described above is registered to D&M Corporation, T. L. Higgers Drugs, 5015 Connecticut Avenue, N.W. The pharmacist at Higgers Drugs informed Detective McKennon that a delivery of two pounds of "lactose" otherwise known as milk sugar, had been made to 5195 Linnean Terrace, N.W., on the morning of December 17, 1969, pursuant to a request from a Mrs. Lee. The pharmacist stated that this was an uncommon request and that he had to order the product specially for Mrs. Lee. "Lactose" is a product commonly used to dilute pure heroin. Two pounds of lactose could be used to "cut" pure heroin into 17,000 capsules for street sale.

10. Further information has been received by Detectives Merritt and Poggi of the Metropolitan Police Department from Special Employee #144, an informant whose information has contributed to the arrests of narcotics violators, that said Special Employee has purchased heroin and cocaine from a man named "Bernie," who lives at 1425 N Street, N.W., Apartment 603. Said Special Employee has identified a photograph of Bernis Lee Thurmon as the "Bernie" who lives at 1425 N Street, N.W. SE 144 has informed Detectives Merritt and Poggi that "Bernie" keeps hundreds of capsules of heroin on his person for customers who come to his apartment, and that he and an associate named "Al" frequently operate motorcycles. SE 144 has told members of the Metropolitan Police Department that "Al" and one Gordie King are two of the biggest narcotic traffickers in the District of Columbia. According to SE 144, King travels to Puerto Rico and Bahamas. King told SE 144 that on one of his trips he gave a party at which he supplied several thousand dollars worth of cocaine. SE 144 does not know where "Al" obtains his narcotics but thinks that he transacts at least some of his business in Atlantic City, New Jersey. "Al" told SE 144 that he had wrecked his automobile in Atlantic City in mid-November. This same information regarding the wrecked automobile had previously been received from SE 54.

The subjects "Al" and Thurmon have been observed on

numerous occasions by members of the Metropolitan Police Department, Narcotic Section, at 1425 N Street, N.W., and also at 5195 Linnean Terrace, N.W.

11. Records of the C & P Telephone Company obtained by subpoena indicate that the above 202-244-7027 was used on May 22, 23, 27, 28, June 1, 19, 24, July 9, and 26, 1969, to call the number 609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company reflect that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5383, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York, and Philadelphia.

On November 19 and 21 and on December 10, 1969, the telephone number 244-7027, was used to call the number 609-345-7332, in Atlantic City, New Jersey. This number is listed to Ike's Liquor Store, which is owned by Isaac Boswell Nicholson, described by the Federal Bureau of Investigation as the "number two man" in the numbers racket in Atlantic City. Nicholson has been arrested on numerous occasions for gambling violations.

On November 19, 1969, the telephone number 244-7027 was twice used to call the number 609-344-1657, which is listed to Frank Stewart, described by the Federal Bureau of Investigation as being involved in narcotics, prostitution and gambling. Stewart owns a bar which, according to the Federal Bureau of Investigation, is used for illegal narcotic transactions.

On November 31, December 8, and 10, 1969, the number 244-7027 was used to call the number 609-344-5919 listed in the Atlantic City, New Jersey, directory to Mamie Jones. The sister of Mamie Jones is one "Toody" Kirkland alleged to be a member of the Kirkland Brothers gang which, according to the Federal Bureau of Investigation, is involved in narcotics, gambling, and other criminal activities. The Federal Bureau of Investigation also reports that Mamie Jones is an associate of Maynard Francis Hayes, a suspected forger and narcotics violator. The number 609-344-5919 was also called from the number 244-7054 on November 26, 1969.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N. W., in a wrecked condition.

10. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, N. W. When driving on his motorcycle he is constantly alert for surveillance.

10a. On January 12, 1970, Alphonso H. Lee was shot in the leg. Shortly thereafter SE 54 learned that Mrs. Teri A. Lee had temporarily taken over the management of "Al's" business and that for the time being SE 54 should make his orders by calling the number 483-2948. The subscriber is listed as Geneva Thornton at 1425 N Street, Northwest, Apartment #603. After learning this SE 54 called the above number and spoke with Bernis Lee Thurmon, a/k/a Benjamin Thornton. SE 54 ordered a large quantity of narcotics from Thurmon which was delivered to it in the Northwest section of the District of Columbia.

11. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

12. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

13. On January 26, 1970, the Court entered an order authorizing the interception of telephone communications to and from number 483-2948 at 1425 N Street, N.W., Apartment 603, Washington, D. C. The intercept was connected on January 24, at 8:00 p.m. and has continued through the present time. Throughout, I have been and

continue to be the supervisory agent for the detail. All incoming and outgoing calls have been monitored and recorded. In my capacity as supervisory agent, I have personally monitored or have listened to the tape recordings of the conversations intercepted pursuant to the Order of January 24, 1970, set forth below.

14. From 1:45 p.m. on January 25, 1970, until 8:00 a.m. on February 10, there have been 294 telephone calls to and from the telephone of Bernis Thurmon, 483-2948. Of these 294 calls, a total of 125 conversations dealt in specific terms with traffic in narcotics concerning sale, delivery, strength, and purchase price.

15. As of 8:00 a.m. on February 10, 1970, nine local individuals which the intercept indicates are major violators have been identified. Probable cause now exists to make application to obtain arrest warrants for these nine individuals. Thirteen other large-scale violators have not yet been fully identified. Numerous other callers who have ordered narcotics or spoken about narcotics transactions have not yet been identified in any way. Thus far, seventeen locations where narcotics are likely to be stored have been discovered. Of these seventeen, probable cause presently exists to make application for a maximum of six places. Extension of the intercept for the projected period can be expected to result in identification of many more narcotic violators and storage points for narcotics in the Washington, D. C. area, and the strengthening of probable cause for arrests, searches and seizures and prosecutions.

16. As of this date agents of the Bureau of Narcotics and Dangerous Drugs have confirmed by surveillance more than twenty narcotic transactions arranged over this telephone where surveillance was possible. Surveillances were possible only because of information gained from the interception itself, and from the opportunity to direct surveillance resources to a particular scene at a particular time. For instance, Bernis Thurmon has been observed on almost each sortie to stop at a location on 15th Street, Northwest, believed to be the location of his stache of narcotics, prior to proceeding to the rendezvous with customers who have just made orders by telephone. He has subsequently been observed on separate occasions to proceed to the known addresses of seven identified narcotics dealers, whom the intercept reveals he is supplying. He has also been observed delivering to other customers in parking lots, on street corners and at the Fantasy Restaurant. The intercept reveals that all of the transactions arranged by Bernis Thurmon are in increments of $25.00 quantities, with orders up to $800.00 per delivery.

17. The intercept at 1425 N Street, Northwest, and related investigation has confirmed the close working relationship, between Alphonso Lee and Bernis Thurmon, described in earlier affidavits:

1) On January 25, 1970, Alphonso Lee called Bernis Thurmon at 483-2948 and asked Bernis to send his gun over to him (Al). Bernis replied that he did not want to be "by there" to see him. Alphonso stated that Bernis owed him $300.00; Bernis claimed it was only $150.00.

3) On January 29, 1970, at 1:18 p.m. officers of the Metropolitan Police Department observed a 1970 yellow Dodge Charger proceed to 1230 13th Street, Northwest, driven by Alphonso Lee. Alphonso Lee, the only occupant, was seen to get out of the car and go to a public phone booth where he appeared to place a call. He returned to his car, and shortly thereafter a Negro male came out of 1230 13th Street, Northwest, and entered the same auto and conversed with Alphonso Lee. Then the Negro male left the car and went back into 1230 13th Street, Northwest. Alphonso Lee then drove to the vicinity of 14th and S Streets, Northwest, where he stopped and had conversations with a number of Negro males who came to his car. The vicinity of 14th and S Streets, Northwest is a known area of high narcotic violation in the District of Columbia.

4) On January 29, 1970, at approximately 4:13 p.m. Bernis called an unidentified male at 638-2521. The male told Bernis to come over in about 10 - 15 minutes, they would meet "down" (stairs).

5) On January 29, 1970, at about 4:25 p.m. officers of the Metropolitan Police Department began surveillance at 1230 13th Street, Northwest. At about 4:30 p.m. a blue, late-model Lincoln with two occupants was observed parked in an alley next to 1230 13th Street, Northwest. The subject Bernis Lee Thurmon has been previously observed driving an automobile of this description. An officer approached the parked automobile and observed Thurmon seated in the drivers seat and a Negro male in the front passenger seat. The two men were seen transferring a bundle of money, approximately four inches high, bills wrapped with rubber bands or string. After the transfer, the subject in the passenger seat was seen leave the Lincoln and enter 1230 13th Street, Northwest, where he boarded an elevator. An of-

ficer who conducted the surveillance of Alphonso Lee earlier in the day conducted this second surveillance and identified the Negro male who met with Thurmon as the same one who had earlier met with Lee.

6) A different source of information has provided information in the past, which has led to the undercover purchase of narcotics on over five occasions which purchases were surveilled by members of the Metropolitan Police Department and yielded substantial quantities of narcotics each time. This source states that during the month of January, 1970, it has heard Alphonso Lee arrange for the sale of narcotics by telephone, and that within the past ten days it has heard Lee arrange for the sale and delivery of narcotics over the telephone 244-7054. The source described "Bernie," Bernis Thurmon, as Alphonso Lee's delivery man.

7) The intercept at 483-2948, has revealed that Alphonso Lee and Bernis Thurmon have spoken to each other about narcotic transactions on numerous occasions. These conversations and others in which "Al" and "Rock Creek Al" are mentioned, indicate that Alphonso Lee is Thurmon's boss or source, and that Thurmon is a principal lieutenant for Lee.

18. As previously mentioned in paragraph 2 above, a Court order authorizing the interception of wire communications at 5195 Linnean Terrace was entered on February 4, 1970. These two intercepts and related investigation have begun to reveal the interstate sources supplying narcotics to this major local wholesaling operation:

1. On January 25, 1970, the first day that conversations were intercepted at 483-2948, Thurmon called Lee at Freedman's Hospital and told Lee that he had just returned from Delaware.

2. On January 31, 1970, Bernis Thurmon called a woman in Delaware who identified herself as Liz. She said she had been planning a trip to Washington.

3. On February 2, 1970, Liz called Bernie at 483-2948, and said she would be in Washington over the weekend. She said that she got the key and that the house was on 7th Street above Georgia Avenue.

4. On February 3, 1970, a woman who identified herself as Grace called from New York City to 483-2948 and spoke with Bernie. Grace asked if Al had gotten out of the hospital. She said that she had spoken to Liz the night before. She also said that she knew a friend of her uncle Tuson who

had a "thing that would take ten" for $1,000.00, and wanted to know if Bernie was interested.

5. On February 7, 1970, at 8:22 p.m. Terry Lee called from 244-7054 to Union Station and asked when the next train was scheduled to leave for Philadelphia. Information stated 9:50 p.m.

6. On February 8, 1970, Alphonso Lee called 483-2948 from a phone other than at 5195 Linnean Terrace, N.W., and asked Geneva if he and Bernie were still going to Baltimore. Geneva said that they were, and Al left the message to have Bernie pick Al up before he left.

7. On February 8, 1970, at 7:44 a.m. Teri Lee called from Philadelphia to 244-7054 and told Al that she would see him later.

8. On February 8, 1970, at 10:00 p.m., Teri Lee called Al at 244-7054 and said she was coming home and was trying to make arrangements for transportation. Teri spoke in disguised language about doing some "other things," and told Al that she would tell him when she got home. Al asked her if it had anything to do with something he didn't have when she left. She said not but stated that she had an appointment with the realtor on Monday.

9. On February 9, 1970, Teri Lee called Al from Philadelphia and said that she would be home that night. She said she was going to engage a subject named Ed to bring her back to the District because she needed more help with the business.

10. On February 9, 1970, at 2:42 p.m., Al called from 244-7054 to Atlantic City, New Jersey to Tootie Kirkland. They spoke about Virginia Rudy (Rufus Williams, who was arrested in the alleged Tantillo-Jackson conspiracy and later slain by an unknown assailant), and Sweetyman (an alias of Irving Allen Hendricks). Al also talked about his "business" which he said centered around the Fantasy, but which he wished to expand.

11. On February 9, 1970, at 3:03 p.m., Teri called Al from Philadelphia and warned him not to buy anything. Al said that he didn't have to buy anything because it was waiting for him. Teri told Al to leave it there and that she would explain later.

A continuing coordination of the intercepts at both addresses is expected to supply further, more specific information about the means being used by Alphonso Lee, Teri Lee and Bernis Thurmon to bring narcotics into the District of Columbia. It will lead to the identification of

out-of-town sources and will enable agents in other cities to conduct surveillances of these individuals with the local subjects of this investigation. This continuing coordination will also reveal and identify other persons and places connected with and being used in the local wholesale operation.

19. Termination of the intercept of telephone 483-2948 used by Bernis Thurmon, in advance of the termination of the interception on facilities at 5195 Linnean Terrace, Northwest, would jeopardize the success of both investigations. The intercept has confirmed the close relationship between these two key figures in the conspiracy. If the Thurmon operation were closed before that of Lee, the wave of resulting arrests and, more importantly, the seizure of narcotics by search warrants, obtained by information through the intercept and left by law on the premises, would reveal the entire investigation and the fact of the intercept to Lee, the major local target. The revelation of the intercept at 1425 N Street, Northwest would immediately alert Lee to the fact that probable cause existed for his arrest, that at least some of his operation and staches were revealed, and that his phone could well be under intercept too. To expect him to continue narcotic operation in the District in the same fashion, and over the same telephone facilities, would be fantasy. At the very least he would alter his operation, which would frustrate the efforts made to date to identify his sources, staches, and major suppliers. On the other hand, to close the Thurmon intercept and continue with the Lee intercept would forfeit the considerable fruits of the Thurmon investigation including the identification of narcotic violators and their staches. In the many anticipated search warrants based on the Thurmon intercept were not executed upon its termination, the information supporting them would be stale by the time the Lee intercept were terminated, so these important resources could not be made. In sum, the operations of Thurmon and Lee are joint, and the investigation and intercept of their illegal activities must likewise be coordinated.

20. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation, with the exception of the aforementioned court authorized intercept of telephone numbers 244-7054 and 244-7027.

WHEREFORE, your affiant believes that probable cause exists to believe that Bernis L. Thurmon and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that affiant further believes that probable cause exists to believe that Bernis Lee Thurmon and others in the Alphonso H. Lee operation described above are engaged in the commission of an offense involving the importation of narcotics, and conspiracy to do so; that Bernis Lee Thurmon operates at 1425 N Street, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he has used and will continue to use the telephone numbered 483-2948 at this address, in connection with the commission of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, extending authorization for Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the number 483-2948 at 1425 N Street, Northwest, Washington, D. C., for a period of eleven (11) days from the effective date of the order.

/s/ Glennon L. Cooper
GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this 10th day of February, 1970.

Judge John Lewis Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in The Matter of an Order Authorizing The Interception of Wire Communications	No.

ORDER

AUTHORIZING CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative or law enforcement officers as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Bernis Lee Thurmon, a/k/a Benjamin Thornton and others, presently operating from Apartment 603, 1425 N Street, N. W., Washington, D. C., within this District, are committing and are about to commit and are conspiring with other persons to commit an offense set forth in Section 2516 of Title 18, United States Code, to wit: the importation and sale of narcotics in violation of Section 174 of Title 21 of the United States Code.

(b) there is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications. In particular, these wire communications will concern the date and the manner in which narcotic drugs will be smuggled

into the United States and the participants and the nature of the conspiracy involved therein and the delivery and illicit sale of these narcotic drugs in this jurisdiction.

(c) all normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining the above information.

(d) there is probable cause to believe that the telephone located at Apartment 603, 1425 N Street, N. W., Washington, D. C., listed to Geneva Thornton and carrying the telephone number 483-2948 is being used and is about to be used in connection with the commission of the above-described offenses and is commonly used by Bernis Lee Thurmon, and others as yet unknown.

WHEREFORE, is it hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

(a) continue to intercept the wire communications of Bernis Lee Thurmon, and other persons as may make use of the telephone hereinbefore described.

(b) such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States, and which reveal the identities of the participants involved therein, and which reveal the illicit destination and method of delivery of these narcotic drugs, and which reveal the identities of those individuals involved in the delivery thereof, or for a period of eleven (11) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization shall be continued in such a way as to minimize the interception of communica-

tions not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of eleven (11) days from the date of this order.

PROVIDING ALSO, that HAROLD J. SULLIVAN shall provide the Court with a report on the 4th and 8th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

John Lewis Smith, Jr.
JUDGE

Date: 2/13/70

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: Feb. 13, 1970

To : Judge John Lewis Smith
United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of January 24, 1970

Between February 7, 1970, at 8:00 a.m. and February 12, at 8:00 a.m. the following developments occurred in connection with the intercept at 1425 N Street, N.W., Apartment 603:

During the period from 8:00 a.m. February 7, through 8:00 a.m. February 8, a total of 18 calls were intercepted, 5 were either related to narcotics or to the alleged conspiracy.

During the period from 8:00 a.m. February 8 through 8:00 a.m. February 9, 6 conversations were intercepted. Three of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. February 9, through 8:00 a.m. February 10, 12 conversations were intercepted. Six of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. on February 10 through 8:00 a.m. on February 11, three of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m., February 11, through 8:00 a.m. February 12, a total of 11 conversations were intercepted. Five of these conversations concerned narcotics or narcotic transactions.

A number of the above drug-related phone conversations resulted in narcotic deliveries which were surveilled by members of the Metropolitan Police Department.

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: Feb. 13, 1970

TO : Judge John Lewis Smith
United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of February 4, 1970

On February 4, 1970, at 8:05 p.m. a court order issued authorizing legal wire intercepts on telephone numbers 244-7027 and 244-7054, located at 5195 Linnean Terrace, Northwest, Washington, D. C. The intercepts were operational as of 9:30 p.m. on February 6, 1970. Between 9:30 a.m. February 6, and 9:40 a.m. February 11, 1970, the following developments occurred in connection with these two intercepts:

Between 9:30 p.m. on February 6, and 9:30 p.m. on February 7, nine conversations were intercepted. Four of these conversations concerned narcotics or narcotic transactions. (Note: On this day technical difficulties with the intercept resulted in poor reception and inoperability of the touch-tone decoders.)

During the period between 9:40 p.m. on February 7, 1970, through 8:00 a.m. on February 8, eighteen conversations were intercepted, of these two conversations concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 8, and 8:00 a.m. on February 9, 1970, six conversations occurred; three of these conversations concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 9 and 8:00 a.m. on February 10, forty-five conversations were intercepted, of these sixteen concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 10, and 8:00 a.m. on February 11, nineteen conversations were intercepted, of these two conversations concerned narcotics or narcotic transactions.

On February 10, 1970, the telephone numbers of the facilities at 5195 Linnean Terrace, Northwest, were changed from 244-7054 and 244-7027 to 244-5611 and 244-5634. The Court was orally advised of these changes on February 10, 1970.

The intercept revealed that Teri A. Lee went to Philadelphia on February 7 or 8, 1970, and returned a few days later. Her calls to Alphonso Lee from Philadelphia indicated that she was picking up narcotic supplies there, and bringing back a new man to "help with the business."

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: 2/17/70

To : Honorable John Lewis Smith, Jr.
Judge, United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of January 24, 1970

At 10:00 a.m. on February 13, 1970, Special Agent James Marshall disconnected the intercept on telephone 483-2948. Subsequently, at 11:20 a.m. on February 13, 1970, Agent Marshall reconnected the intercept after being informed that the authorization had been renewed for eleven (11) days.

Between 8:00 a.m. on February 13 and 8:00 a.m. on February 14, 1970, there were a total of eighteen conversations intercepted of which seven were apparently drug related.

Between 8:00 a.m. on February 14 and 8:00 a.m. on February 15, 1970, there were a total of thirteen conversations intercepted of which six were apparently drug related.

Between 8:00 a.m. February 15 and 8:00 a.m. on February 16, 1970, there were a total of twenty-eight conversations intercepted of which nine were apparently drug related.

Between 8:00 a.m. on February 16 and 8:00 a.m. on February 17, 1970, a total of twenty-one conversations were intercepted, twelve of these were apparently drug related.

On February 16, 1970, Bernie called 332-8814 listed to John Edward Scott, and asked for "Reds." Bernie said he needed fifty and "Reds" answered that he did not have that much but that he could get fifteen.

The intercept also revealed a joint trip to Baltimore by Alphonso Lee and Bernis Thurmon, two key local members of the conspiracy, on February 8, 1970.

The intercept has also revealed a number of new customers arranging to purchase from Bernis Thurmon.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 1971 HEARINGS

GLENNON L. COOPER, resumed the stand and having been previously duly sworn, was examined and testified further as follows:

Tr. 304

MR. PALMER: No, my question was did he ever read the order actually signed by the Judge, sir.

THE COURT: Well, he just said he read it before the Judge signed it.

MR. PALMER: My point is since a Judge can modify an order——

THE COURT: Are you asking if he read it before or after is was signed?

MR. PALMER: Yes, sir.

THE COURT: All right, put that question.

MR. PALMER: Yes, sir.

BY MR. PALMER:

Q. Did you read the order after it was signed by the Judge?

A. Yes, I did, yes.

Q. At the Judge's house?

A. I don't believe so.

Q. Did you read this order before or after you installed the intercept and the pen register and the touch-tone recorder?

A. I read the order before and after it was signed.

Tr. 305—06

BY MR. PALMER:

Q. Did you understand Judge Smith's order to require you to refrain from listening to conversations that were not pertaining to narcotics or narcotics conspiracy etc.

A. I understood the order to restrict us to conversation relating to narcotics.

Q. And what did you do to follow that part of the order; to limit the extent of the wiretap in this case?

A. I relayed the instructions to the agents who would be manning the intercept.

Q. And, what did the agents do, if anything, to so limit the 24 hour day listening post?

A. The agents were to be alert to——

Q. Excuse me, sir, but my question is what did they in fact do pursuant to the order, if anything, to limit the overhear and recordation on that phone?

A. As it turned out the conversations, nearly all the conversations were recorded.

Q. Yes, sir. Is it fair to say sir, that they did nothing in fact to limit their following of or to limit their overhearing of the conversations as dictated or as indicated by Judge Smith. Is that a fair statement, sir—that they really did nothing to do that?

A. No, that is not a fair statement.

Tr. 307—08

THE COURT: Then it was understood at the beginning that in order to determine whether or not narcotics were being discussed over the phone that all conversations would have to be monitored, is that not correct?

THE WITNESS: That is correct.

BY MR. PALMER:

Q. So in other words, what you are saying is that the agents were instructed to monitor all conversations, is that correct?

A. They were not specifically instructed to monitor all conversations.

Q. What were they instructed to do, what were their instructions?

A. They were instructed to monitor calls except for those calls which fell into a privileged nature, certain restricted types of calls.

Q. What would they be, sir?

A. These were calls between, calls between a client and attorney, wherein the discussion was maybe on the pending case in which the client or the defendant may have been involved——

Q. What else, sir?

A. Well there were restrictions on calls between attorney and client, doctor and patient——

THE COURT: How were they to make this determination?

THE WITNESS: The calls would have to be listened to, when either of this type of situation would arise, in order to

determine if there was any narcotics activity being discussed.

THE COURT: Yes?

THE WITNESS: Upon determination of the call Mr. Sullivan was to be notified immediately and if in fact conversations were intercepted between client and attorney in that relationship, discussing the case, it would not be listened to any further, once that determination was made.

Tr. 309—10

Q. And those guidelines were your guidelines, that you had——

A. They were guidelines by myself and Mr. Sullivan.

Q. Did you get them from reading the Court's order at all?

A. The Court's order?

Q. Yes.

A. Judge Smith's?

Q. Yes. The order under which you were intercepting—did you get the guidelines from there?

A. Well as I say, I recall specific instructions from Mr. Sullivan—we had so many discussions relevant to the proper conduct of the intercept.

Tr. 310—11-A

BY MR. PALMER:

Q. Agent Cooper, insofar as the wiretap was concerned did you and the other agents consider the order signed by Judge Smith to be your limiting authority, your guidelines as to what to do and how to tap?

A. Yes, we did.

Q. And you have the order in front of you do you not, sir?

A. Yes.

Q. Now Agent Cooper, what guidelines of the order did you use to limit or to direct you on what were your guidelines and how you should prevent overhear or how to exercise discretion in limiting overhear of non-drug related conversations?

MR. KELLOGG: Objection, Your Honor. It seems to me that what we are getting into is a question that calls for a legal interpretation on the part of the agent, of a legal document—that is, an order. There was no question, Your Honor, and it is conceded by the Government that the order

was interpreted by the supervising attorney, Mr. Sullivan, and that he gave directions regarding this to Agent Cooper. I do not think it is appropriate to go into the interpretation of a legal document with this witness.

THE COURT: But I don't think he is asking him for a legal interpretation. He asked him what the guidelines were that he used.

Now, who interpreted that is another matter but he is not asking him to give a legal interpretation. He asked him what did he use as guidelines. Now, why he used it or what the reasons are is a different proposition.

MR. PALMER: Yes, Your Honor, exactly.

Tr. 312

BY MR. PALMER:

Q. What guidelines under the order, sir, did you use to limit the discretion of the agents in overhearing information and non-drug related conversations, sir?

A. I would have to say that I as supervising agent relied on the authority and the expertise of Mr. Sullivan and he relayed to me that his authority or our authority to intercept had come from the order.

Q. So you, sir, did not specifically read or rely on any limiting language in the order itself, that is directed to you as a member of the Bureau of Narcotics and Dangerous Drugs, is that correct, sir?

A. Well, I was told I was to rely on the authority of the order.

Tr. 313—16

Q. And you mentioned all three specifically in your application so that you could be authorized for each one, one, two and three, is that correct?

A. Yes.

Q. Did you notice in the order that you read that you had not been authorized to use a pen register touch-tone decorder as requested?

MR. BUCKLIN: Your Honor, I would register on behalf of the Government the same objection.

THE COURT: The question is did he notice, not whether he did.

MR. BUCKLIN: Well it is the same objection which you sustained to the question put to him by Mr. Shorter.

THE COURT: You may answer.

THE WITNESS: Well yesterday I believe I answered that I did see it in the order but upon further perusal I notice it is not in the order specifically.

BY MR. PALMER:

Q. So having read it, if you had read that order you would not have installed these devices, is that not correct, sir—if you had read it carefully, you would not have installed those devices? Is that a correct statement?

A. If I had, if I had been made aware or if it had been made known to me—

Q. I'm asking you, if you had read the order carefully—

THE COURT: Let him finish his answer.

MR. PALMER: Very well, Your Honor.

THE WITNESS: If it had been made known to me that I didn't have authority to initiate the intercept either by the pen register or the touch-tone decoder, it wouldn't have been done.

BY MR. PALMER:

Q. Well if you had read the order carefully yourself, and the direction to you as an agent, is it fair to say, sir, that based upon your application and based upon what was authorized as a direction to you from the Court, a Judge to you, is it fair to say that you would not have installed these devices if you had read the order carefully—either the pen recorder or the touch-tone decoder?

THE COURT: I think you are asking him now for a legal opinion, Mr. Palmer.

MR. PALMER: Well I think I'm only asking, if I may, Your Honor, as to how he read the order.

THE COURT: Well as to how he would have interpreted the order is a legal conclusion.

MR. PALMER: Actually, I am trying to see if he read it carefully and —

THE COURT: I have ruled.

BY MR. PALMER:

Q. Now, sir, who, in fact, did you rely upon to install the pen recorder and the touch-tone decoder?

A. Who did I rely upon for authority?

Q. Yes, sir.

A. As I say, the order was interpreted to me by Mr. Sullivan.

Q. To include those devices, is that correct?

A. Correct.

Q. Now, sir, in executing the order to you, did you ever know whether the intercept was to terminate upon your first receipt of a narcotic related conversation?

THE COURT: What is that question again?

MR. PALMER: Whether or not the agent knew he was to terminate an intercept upon the receipt of a narcotic related conversation overhear.

THE COURT: Well how would he know what was in an agent's mind? You can ask him whether he gave him instructions and what they were. But to ask him whether he knew what the agent knew—that is a different situation.

BY MR. P[illegible]:

Q. Were you instructed to—

THE COURT: Or whether he knows whether he gave him any instructions or knows whether any instructions were ever given to the agent.

MR. PALMER: Very well, sir.

BY MR. PALMER:

Q. Were any such instructions to terminate a tap upon receipt of the first overhear of a non-drug related conversation given?

A. No.

Q. Excuse me, what does no mean?

A. There was no instruction given to terminate the intercept upon receipt of one non-narcotic related call.

Tr. 317—318

Q. Now you indicated that if a doctor or a lawyer or a priest-penitent conversation came through, the agent was to do certain things, is that correct?

A. Correct.

Q. And the agent received his instructions as to his discretion from whom, sir?

A. Those instructions, the agent received instructions from me.

Q. From you?

A. Yes, sir.

Q. Now we have had turned over to us the transcript of all the recording of the calls, is that not correct?

A. Yes.

Q. And as part of his discretion, were the agents to limit the overhear on such things as time checks, the time of day? Was their discretion, or would you tell us what their discretion was to be as to hearing a conversation, say, relating to the time of day, for instance? Did they have any discretion as to that?

A. As I said before, it was up to the agent to listen to the conversation and determine what type of conversation it was.

Q. Well what about the time of day—is there any question about that? What were they supposed to do about the time of day in a phone call—did they have discretion as to that? What were they supposed to do and what was the understanding?

A. Do you mean a telephone call to determine what time it was?

Q. Yes, when you dial TI 4-2525, you get the time of day. What was the agent supposed to do in recording or overhearing that sort of conversation?

A. I believe we told them to listen to those conversations.

Q. And record them?

A. In the event that—

Q. —it was drug related?

A. In the event that once it was terminated and another call was placed quickly thereafter, we would be that close.

Tr. 319—321

Q. In this volume that we have, they were all from day one to the end of the taps, I believe, and could you point to any discretion exercised by any agent at any time that resulted in the non-recordation, as a discretionary matter, as to what was overheard, every minute of every day?

A. I cannot, sir.

Q. And the reason you cannot, sir, is it fair to say, is because it was a wide-open listening post, is that not so?

A. That is not fair, sir.

Q. Could you tell us either from your own knowledge, hearsay, or otherwise, a single occasion when Mr. Sullivan was called because there might have been something that shouldn't have been overheard?

A. Yes.

Q. When were they, sir?

A. Well, Mr. Sullivan was called several times during the course of the intercept.

Q. Relating to what particular, relating to what particular conversation?

A. To a particular conversation.

Q. To limit discretion in overhearing it—what was the nature of the conversation with Mr. Sullivan on those occasions that you speak of, sir? First of all, when was the first one—when was the first occasion, at what time, date and place?

A. I can't be specific. I know continuing from the time of the intercept and continuing thereafter, seven days a week, I was there, and I made phone calls to Mr. Sullivan relating to pertinent information which had been revealed as a result of the intercept.

Q. Well, what you are saying, is it not true, sir, is that you were relaying intelligence to him as to what you were picking up from the intercept? Isn't that what you are saying?

A. That is one of the things we were doing, yes.

Q. Well, wasn't what you were doing, calling up and saying, "Mr. Sullivan, listen to what we just overheard—this is pretty good stuff and I think you should know"? Is that what the calls were about?

A. No, that is not correct.

Q. Well give us an example of any call to Mr. Sullivan which you or any agent sought to limit your discretion in overhearing a conversation.

A. I know of no such incident. I would have to check and look in order to point out the page number and such.

MR. PALMER: With the Court's indulgence, may the witness refresh his recollection as to this point?

THE COURT: Yes.

THE WITNESS: Beginning on February 18, 1970—

MR. PALMER: Yes?

THE WITNESS: —and continuing until February 19, 1970, the intercept was cut off.

BY MR. PALMER:

Q. I asked you about calls to Mr. Sullivan in order to limit your discretion or the discretion of your officers.

A. Conversations were intercepted and as a result of this, telephone calls were placed to Mr. Sullivan which resulted in the cutting off of the intercept, the listening.

Q. And what was the reason for that, sir?

A. Because there was apparently a malfunction in the telephone lines due to the placing of the intercept on another wire inadvertently by the Telephone Company personnel.

Tr. 322

Q. All right. Now, going back to my inquiry, could you point out—to begin with, just one, if you can, any instance in which a call was placed to Mr. Sullivan to limit the discretion of any agent during the time of the tap and recording being in function, seeking to limit it—was that ever done, sir?

A. I don't believe there were any such calls made.

Tr. 323—325

Q. Turning to page No. 24 of the intercept, if you will—

MR. BUCKLIN: Counsel have the two copies, Your Honor. We gave up our copy.

BY MR. PALMER:

Q. Do you see in the middle of that page outgoing call from Geneva Jenkins to her mother—do you see that, sir?

A. Yes, I do.

Q. Was Geneva Jenkins' mother at all the object of your inquiry? Was she in any way, shape or form thought to be involved in a narcotics conspiracy?

A. We didn't have any knowledge one way or the other.

Q. And the conversation between Geneva Jenkins and her mother goes on for how many pages in that transcript, sir?

MR. KELLOGG: What is the number of the cite, please?

MR. BUCKLIN: Page 24.

MR. KELLOGG: I have the cite, thank you.

THE WITNESS: Three pages.

MR. PALMER: Excuse me?

THE WITNESS: Three pages.

BY MR. PALMER:

Q. It extends over page 24, 25 and 26, is that correct?

A. That is correct.

Q. Did it relate to, for example, sir, clothing—this conversation?

A. Yes, I believe it did.

Q. Did it relate to her furniture in storage?

A. Yes.

Q. Did not the whole conversation basically concern Geneva Jenkins seeking to move to another location and her mother helping her move and get a truck for her and things of that nature?

A. As I recall it without reading through it again, that was the gist of the conversation.

Q. Now, there was no attempt made to seek to limit any such conversation at all, was there, Officer, to limit the intercept any more or anything like that in that particular case, or the recording?

A. Well, the record was recorded—the call was recorded.

Q. Now is it fair to say, sir, as far as this call was occurring between Miss Jenkins and her mother, that the agent had on earphones and they were listening to the conversation as it occurred?

A. Correct.

Q. And at no time—Well, strike that.

He could have refrained from listening at any time, could he not, or he could have cut off the recording when he determined the conversation was innocuous, is that not correct, sir? He could have turned it off?

A. He could have turned it off, yes.

Q. So on this one conversation with the mother, there was nothing that you knew, nothing to indicate the mother's involvement with narcotic drugs, was there?

A. There was no discussion of narcotics, that is correct.

Q. And you never had any single piece of information, did you, that the mother was involved in any way with this illicit dealing in narcotic drugs, did you?

A. No, we did not.

Q. Is what you are saying, then, that when you get right down to it, Agent Cooper, regardless of who is called, or who is the caller, it may conceivably involve drugs at some point, somewhere and at some time and, therefore, the listening post is always maintained. Is that what you are saying?

A. I am saying that all calls would have to be listened to in order to have a determination made as to what the type of conversation was.

Tr. 348—359

Now, we indicated and you looked with me before at page number 24 of the three-page-or-so conversation between Geneva Jenkins and her mother. Is that correct?

A. That is correct.

Q. Right.

Now, was there anything in that conversation which led any agent, in any shape, form, or manner, to conclude that

her mother was in any part or related to the object of your intercept?

THE COURT: This is repetitious, Mr. Palmer. You have asked him that question.

BY MR. PALMER:

Q. Now, at page 41, sir, the next day, January 27th of 1970. . .

A. Yes.

Q. . . .there is a page in some conversation between Miss Jenkins and whom?

A. Transcript indicates the mother.

Q. Is that an entirely innocent conversation?

A. I see on the call "Geneva" indicates the first name of one of the persons. . .

THE COURT: It said what?

THE WITNESS: It indicates the name "Al," who was one of the defendants in this conversation.

BY MR. PALMER:

Q. What was the conversation about?

A. I would have to go through and refresh my recollection.

Q. Okay.

[The witness looks through the transcript in question.]

THE WITNESS: Well, the conversation, basically, is about Geneva going to her mother's; but the name of another co-defendant is mentioned also.

BY MR. PALMER:

Q. The name "Al"? Where is the name "Al" mentioned?

A. Page 41.

Q. You are referring. . .

A. The name Vernie also.

Q. Well, Vernie is her boyfriend that she's living with, right?

A. Correct.

Q. You knew that.

Is there anything in the second conversation just point out to indicate any incrimination or any wrongdoing on the part of Geneva's mother?

A. Well, after listening to the conversation, one can determine that apparently there is none.

Q. All right.

That was the second conversation.

Now, was any attempt made to not monitor the second conversation with her mother?

A. No, there wasn't.

Q. Now, at this point it's a pretty fair indication that her mother is just her mother and not involved in any wrong doing. Is that correct?

A. Well, we have no way of knowing at this point.

You couldn't be certain.

Q. You couldn't be certain. I see.

How about on page 55, now January 28th of 1970. Is there a conversation there?

A. Yes, there is.

Q. How many page conversation?

A. Little better than three pages.

Q. Between whom, sir?

A. Transcript indicates Geneva and her mother.

Q. Was there any attempt made to shut off or not to monitor that conversation as soon as it was determined whom it was between?

A. No.

Q. The conversation revolved around, for example, vitamin pills and medicine for Geneva.

A. There is some terminology on the street used to indicate quantities of narcotics.

Q. So that's what you thought that this was. Is that right?

A. Which is identical to such items as medicine and pills and things of this nature.

Q. Are you telling the Court that you thought that this conversation between her mother and Geneva Jenkins involved around narcotic drugs? Is that what you are telling the Court?

A. I'm not saying that. I am. . .

Q. But I'm asking that question.

A. The only thing I am talking about is on the transcript as soon as the call came in; I am saying that an agent listening to the call is supposed to be alert to certain language in it.

Q. I see.

A. And this type of terminology is used to identify various items of narcotics.

Q. They talk about work, moving, and a job, do they not?

A. Yes.

Q. Any indication from this third conversation that the mother is involved in what you are seeking to find out—if she is involved in the narcotic conspiracy—from the third three-page conversation?

A. As I recall from reviewing these conversations, it was determined that the conversations apparently did not involve her.

Q. Turning now to page 132, the date February 4, 1970, sir, there was reported how extensive a conversation? How many pages of transcript?

MR. KELLOGG: What was that page number?

MR. PALMER: Starting at page 132.

THE WITNESS: About four pages.

BY MR. PALMER:

Q. And how long did that conversation transpire? How long did that take, a conversation of that nature?

A. [No response]

Q. Based on your experience as to listening to these things?

A. [No response]

Q. The footage is 99 to 166. You will see at page 132 that that's the footage indicated.

A. Yes.

Q. How long would a conversation like that take?

A. I would have to guess and say a half an hour, twenty minutes or a half an hour.

Q. Here, again, nothing to indicate the mother was involved in the narcotics conspiracy, was there?

A. As I said before, on reviewing the conversations, there was no apparent involvement on the mother's part.

Q. And was there any attempt made not to listen to this conversation, up to twenty minutes or a half hour between Miss Jenkins and her mother?

A. No.

Q. Turning now to transcript 197 of February 8th of 1970, the footage is 037 to 9. That is a conversation between whom, sir?

A. The transcript indicates Geneva and Gloria's mother.

Q. Excuse me. Geneva's mother, isn't it?

A. Gloria's mother. Page 197?

Q. All right.

Who is—do you know who Gloria is?

A. Yes, I do.

Q. Had there been any other calls between Geneva and Gloria's mother?

A. Not to this point, as I recall.

Q. This was an innocent conversation, wasn't it?

A. As I recall, it turned out to be.

Q. And how long did that conversation take?

A. [No response]

THE COURT: Mr. Palmer?

MR. PALMER: Yes, sir.

THE COURT: Do you plan to go through every one of them? I believe that the record indicates that 60 percent of the calls were non-narcotics related.

MR. PALMER: Yes, sir.

THE COURT: Doesn't that establish the point that you have in mind?

MR. PALMER: Yes, sir, it does.

[Mr. Shorter and Mr. Palmer confer.]

BY MR. PALMER:

Q. At transcript 64, at the bottom, who was called on that occasion?

A. It was a telephone call to an office of an establishment.

Q. A birth control clinic?

A. Yes, sir.

Q. And was that conversation recorded also?

A. Yes, it was.

Q. Now, aside from that one time that you indicated that it was a legal tap for a one-day period because a wrong connection had been made, is there anything to indicate, anything you can point to, any log or any record, that the taps and surveillance conducted in this case was anything other than a 24-hour-a-day open wire tap? (Word 'legal' phonetically)

A. What do you mean by "open wire tap"?

Q. That everything was listened to, recorded, transcribed, all ingoing and outgoing calls, except for the one malfunction that you've indicated.

A. Well, there were other calls that were not recorded due to human error.

Q. Aside from human error—you mean by "malfunction," someone forgot to turn the switch?

A. [No response]

Q. Is that what you mean by "human error"?

A. Correct.

Q. All right.

Aside from that—talking about discretion of the agent—at any time did any agent exercise his discretion voluntarily, not recording or overhearing the conversation?

A. Virtually all of the calls were recorded.

Q. All right.

And I think you indicated, did you not, Agent Cooper, that you really couldn't tell unless you heard it and recorded it and reviewed it. Isn't that right?

A. [No response]

Q. That was one of the reasons that you gave. Isn't that correct?

A. I don't think I said that.

Q. What did you say, sir?

A. You cannot tell specifically what a telephone call is about until you begin listening to it. Once you begin listening to it, it is possible to determine what type of call it is.

Q. Right.

Now, for example, . . .

A. It is possible in some cases.

Q. Now, by the time Miss Jenkins and her mother were talking for the fourth or fifth time for about a half hour, the agent could determine, quite naturally, that was not related to anything you were interested in. Isn't that correct?

A. [No response]

Q. Is that fair to say?

A. It would be fair to say that most of the agents operating the intercept were aware of what the conversations were between Geneva and her mother.

Q. And that they were non-related to the conspiracy. Right?

A. Some of them appeared to be apparently non-related to narcotics.

Q. Was there ever—you had these guidelines. Why was discretion never exercised to not overhear and record those innocuous calls—based on the guidelines you were telling us about that existed?

A. Well, the guidelines that I mentioned were not frivolous conversation, but understanding confidential relationship.

Q. What about the birth control clinic? Did that apply to confidential relationship?

A. That was the first phone call she made. To us, it was a new receiver—a new correspondent. We normally would

listen to anyone that is talking to a new number, speaking to a new individual, some of them we hadn't noted yet.

Q. In other words, getting to the guidelines, a call is placed, for example, to the newspaper for information or for a job, that would be recorded. That's not privileged. Is that correct?

A. It probably would be, especially if it would be the first phone call to a particular number if a number were recorded.

Q. Well, it would continually be recorded if it didn't fall in the category you spoke of. A call to a newspaper would always be recorded, would it not, under these standards operating in this case? Is that not correct, sir?

A. Possibility that it would be.

Q. The way the tap was operated here, it would have been. Is that not correct to say, sir?

A. It possibly would have.

Q. "Possibly" or "probably" would have been.

A. Probably.

Q. All right.

And that would go for banks, schools—is that correct?

A. Insofar as I have said, the calls to new individuals, new parties, new number calls would be listened to as a matter of course.

Q. The first call to a lawyer, for example, would that not be recorded?

A. It would depend on the nature of the conversation.

Q. And that you could only tell by hearing it and recording it to determine if there was anything wrong about it. Isn't that correct?

A. Up until that point, you begin listening to the conversation up until the point where you determine it is or it is not a privileged conversation.

Q. And what would be the guidelines that you have for that?

A. [No response]

Q. How would you know. . .

A. You learn. . .

Q. Excuse me, sir.

How could you know—what guidelines would you have that would make you conclude—what discretionary function did you have to know that a conversation between a lawyer and one of these phones was privileged? What were your guidelines, sir?

A. If it were a conversation between an attorney and a

client and a discussion was had relative to a case under indictment, a pending case. . .

Q. What would happen?

A. The call would be determined. If it had not been. . .

Q. Would that determination only be made after the entire conversation had been recorded?

A. No.

Q. You are saying that it would have been shut off before then?

A. It would have been shut off at the time the agent knew in his mind what the subject of the conversation was.

Q. And that would depend upon the individual judgment of whatever agent was monitoring the tap at that time—that given time. Is that right?

A. Correct. Yes.

Q. Now, sir, the pen register and touch tone tape decoder picked up approximately how many outgoing numbers in this case?

A. Several. You want a figure?

Q. Yes.

A. I would say approximately—I would have to make a guess and say 30 to 40.

Tr. 401—02

Q. Agent Cooper, do you still have the transcript of the calls referred to by defense counsel?

A. Yes, I do.

Q. Would you turn to page No. 42 of that transcript?

A. Yes, sir.

Q. Which is a call which begins on page No. 41 which is listed as being between Geneva and her mother which was referred to by Mr. Palmer.

I would like to direct your attention to the fifth line from the bottom and that is the fifth notation of the speakers from the bottom where Geneva and her mother speak regarding whether or not Bernie could come by to pick her up. And then there is Geneva's response—Do you have that?

Miss Burt: I would object to that, Your Honor, because the question is being asked at this time that goes to events which occurred after the interception had been placed on the telephone. It goes to conversation after that.

The Court: This matter came out after it had passed that and Mr. Palmer raised the issue of going beyond that

matter and I permitted it and all or most of the counsel participated in that, so the objection is overruled.

MISS BURT: Yes, Your Honor.

BY MR. KELLOGG:

Q. Would you tell us what that response by Geneva was to the question by her mother as to whether Bernie could bring her over to the mother's—or?

A. The transcript indicates that Geneva says, "I got all, I got everything, you know, together, so he is out taking care of his business now."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

MOTION FOR RECONSIDERATION OF ORDER SUPPRESSING EVIDENCE

On April 29, 1971, this Court granted defense motions to suppress all evidence which flowed from wiretaps used in this case. The ground upon which the Court's ruling is based—that the executing agents failed to "minimize the interception of communications that are not otherwise subject to interception" (Memorandum on Motions at 38)—was advanced by only one defense counsel in writing and then in one sentence supported by a short paragraph of argument. (Motion to Suppress of Defendant Reginald C. Jackson at 3.) The United States did not respond to this issue directly in writing. While the point was pursued by other defense counsel, and opposed by Government counsel orally, neither defense or Government counsel presented the Court with a detailed analysis of each of the intercepted calls. Failure to do so has created a distorted picture of the calls' content and of the reasonableness of the surveilling agents' execution of the wiretap order.

The Court's ruling is premised on a finding that the order authorizing the wiretap was violated in that it was not executed in a way tending to minimize the interception of nonrelated calls. That finding is grounded in substantial part on representations made at hearings on defense motions, that approximately 40 percent of the calls intercepted involved narcotics and that the remaining 60 percent did not, the implication being that the 60 percent of the calls which were "unrelated" were in large measure intercepted beyond the scope of the authorizing order. It is the United States' contention that such an implication is wholly unfounded, for reasons set out below in the discussion of the call analysis.

In addition the Court's ruling is based in part on the testimony of Agent Cooper that he had no specific knowledge of calls which were not intercepted as a discretionary matter. We do not propose to present evidence to the contrary. We have argued fully our contention that the agents were specifically instructed to seize narcotics calls, that they

were specifically instructed not to listen to certain privileged calls and to report others to the supervisory attorney in order that special guidelines could be formulated regarding similar future calls. But it is not our position that all calls must be listened to in every situation in order to determine if they relate to narcotics. (Memorandum at 35.) Rather, we contend that the peculiar characteristics of *this* conspiracy were such that nearly all calls had to be listened to and were justifiably intercepted under the order. The agents were dealing with conversations that were both cryptic and equivocal, the speakers rarely identified themselves, varying coded language was extensively used, narcotics conversations were intermingled with personal conversations, narcotics transactions were conducted on the tapped telephone at all times of the day and night and involved males and females.

We submit that in these circumstances an analysis of the intercepted calls is essential to a determination of whether the agents' conduct in executing the order was reasonable and hence lawful. Accordingly, we present to the Court in connection with this motion to reconsider a detailed analysis of each call intercepted during execution of Judge Smith's wiretap order.[1]

In summary, it is our contention that on the basis of the limiting instructions to the agents discussed above, the unique characteristics of this conspiracy and the analysis of the calls intercepted that there was no violation of the order's minimization clause; that even assuming *arguendo* that calls were intercepted beyond the scope of the order, the appropriate remedy is to suppress those calls intercepted unlawfully; and finally, that in no event should incriminating calls be suppressed as to those defendants who were not parties to any call intercepted beyond the scope of the order.[2]

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[1] By appendix we have set out the call analysis of the N Street intercept in this motion. That intercept's conduct was the focus of hearings on defense motions and of the Court's memorandum ruling. We have available for the Court, similar analyses of the calls intercepted on the Linnean Terrace telephones.

[2] In the N Street intercept there were no calls intercepted involving defendant Scott, Jackson, George Jenkins, Spencer and Daviage which were in any way arguably beyond the scope of the order. None of the calls in which these five defendants were involved is even classified as UNRE—unrelated but intercepted with a reasonable expectation that it would involve narcotics.

I. *The Call Analysis Shows Substantial Compliance with the Court Order.*

A. *Statistical Summary*

From January 24, 1970 through February 24, 1970, there were 384 calls intercepted on the N Street telephone. For reasons articulated in detail below only 6 calls, or 1.56 percent were seized beyond the scope of the order. Only technical connections were counted as calls; thus, unanswered incoming and outgoing calls were not calculated as calls. Of the 384 calls, 126 or 32.8 percent involved in substance the narcotics enterprise. Seven calls, or 1.8 percent involved the narcotics enterprise in part. Twenty-one calls, or 5.4 percent were of evidentiary value, such as aiding in the identification of a conspirator. One hundred and forty-two calls, or 36.9 percent were permissibly intercepted, but ambiguous calls, the purpose of which could not be determined. The great majority of these calls consisted of the caller reaching a party other than the person to whom he desired to speak, and upon being informed that his party was not there, leaving a message that he had called. *E.g.*, A: "Is C there?" B: "No, he's gone." A: "Well tell him A called." Where no subsequent call revealed the purpose of such a call, it was classified as ambiguous. Twenty-seven calls, or 7.04 percent were calls to a number where only a recording was played at the called number. Fifty-five calls, or 14.3 percent involved conversations unrelated to the narcotics enterprise, but which were intercepted, for reasons set out below, with a reasonable expectation that narcotics would be involved. Six calls, or 1.5625 percent involved conversations unrelated to the narcotics enterprise which could not reasonably have been expected to involve narcotics or material of evidentiary value.

Narcotic in Substance—NS. This category is self-explanatory and involves conversations relating to the narcotics enterprise in substance. Examples of these are as follows: 1) Al Lee calls Bernie and asks him to bring his "thing" to the hospital, and they discuss the manner in which it will be paid for. I.Tr. 1. 2) Mickey calls Geneva and asks her to tell Bernie that she is at the Zanzibar and orders "1 and 1." I.Tr. 82. 3) George calls Bernie and tells him to "bring me a trey." I.Tr. 83. 4) Al Spencer calls Bernie and tells him to come over, to "bring my son" and that he (Spencer) has money, "a trey" for him. I.Tr. 114. 5) Bernie calls Red

and tells him Al Lee just called and said that "he couldn't make no more" until he picked up the scratch, probably tomorrow. Red said it would not be tomorrow, that Bernie would have his thing this evening. Bernie said that he was maked and to order that "other thing" for him. I.Tr. 172.

Narcotic in Part—NP. This category involves conversations the bulk of which are unrelated to narcotics, but a part of which do relate to narcotics. For example, Bernard Smith calls Bernie and they have a conversation concerning various matters, including professional basketball. At the end, Bernie says he is coming over that way and Bernard says that Bernie should bring him "a dime" and a little "other stuff." I.Tr. 98.

Mere Evidence—ME. Calls in this category do not involve ordinary purchases and sales of narcotics by the speakers. They do, however, provide information of evidentiary value within the scope of the authorizing order's objective. See *Warden v. Hayden,* 387 U.S. 294 (1967). Following are examples: 1) Al Spencer calls Bernie and tells him he has just been to see Al and Al told him Bernie owed him $150, and that Bernie had said he would send it to him by Al Spencer. I.Tr. 5. Less than an hour before Bernie had had a conversation with Al Lee in which Lee asked Bernie to send his "thing" to the hospital and they discussed the $150 Bernie owed Lee. Bernie said he'd send it by "Al, that nigger with the Mark III." I.Tr. 2. The Spencer-Thurmon conversation shortly thereafter is of evidentiary value because it corroborates the first mention of the prospective delivery by the third person, and second it serves to assist in the identification of the delivery man, Al Spencer. 2) After a call from Al Lee to Bernie in which Lee says that Red wants him to pick up the scratch and they agree to meet, Lee calls Bernie back and asks him to "bring that title" with him. I.Tr. 172. This call, though not narcotic in its content is of evidentiary value because Lee was observed during one of the informant purchases recited in the wiretap application, riding a motorcycle, the tags to which were registered to Benjamin Thornton, a Thurmon alias, at 1425 N Street, NW., Apartment 603. The "title" referred to was suspected to be the title to the motorcycle which would have been mailed to the registered owner, Thornton, rather than the true owner, Lee. When a search warrant was executed at the Lee premises at the conclusion of the intercept, a title in Thornton's name and address for the motorcycle might well have been discovered. 3) Grace calls

Bernie from New York and tells him that a fellow up there had a "thing that will take ten for $1,000.00." She said she had started to call Bernie to come get it, but she "didn't think [he] wanted to be on [his] own." When Bernie said he was on his own, she said "you know what I mean, away from other people. Is Al still in the hospital!" I.Tr. 125. This statement is of obvious evidentiary value, linking Bernie to Al as a buyer from Al.

Ambiguous. Calls classified in this category are generally so brief that the purpose of the call could not be determined, nor had any opportunity or reason arisen to disconnect the intercept. For example, there are many calls in which the caller asks for a party who is not present, and upon being informed of that, says he will call back. In any of the variations of this, if no subsequent call explains the purpose, it is classified as ambiguous. *E.g.,* I.Tr. 58, 65, 68, 272. If a subsequent call does explain the purpose of the first call it was classified in the same category as the subsequent call.

The United States contends that all calls in this category were lawfully intercepted under Judge Smith's order. We submit that the agents must be permitted to listen to enough of any igven call to determine its basic purpose. And if a call simply does not progress to the point that a purpose can be determined, there could have been no violation of the intercept order. For even if the agents are to intercept communications in a manner so as to minimize the interception of unrelated calls, they cannot reasonably be required to shut off the interception of any call until its basic purpose is known. We emphasize here that this is not to say all calls must be listened to in their entirety to know what they are about. Rather, this category was used only for calls which terminated before a purpose could be determined.

Recordings—R. These calls consist of calls to numbers at which the caller hears only a recorded message: time, weather, and the like. The Court in its memorandum filed herein, cited the interception of these calls as examples of interceptions beyond the scope of the authorizing order. (Memorandum on Motions at 35.) It is the Government's position that the interception of these calls was clearly permissible and not in violation of the order because they intercept nothing intended to be private. The recordings are intended for use by the general public and carry a telephone number listed in the District of Columbia telephone directory. Since nothing is obtained that is not openly avail-

able to the general public, there is a minimal, if any, invasion of the caller's privacy. The only information gained is the fact and time of such a call. This information could have been obtained through use of a pen register device alone, a use which the wiretap statute's legislative history explicitly indicates is *not* an "interception" as that term is used in the statute. S. Rep. 1097, April 29, 1968 at 90.

Unrelated but Intercepted with a Reasonable Expectation of Related Conversation—UNRE. There were 55 such calls intercepted throughout the N Street wiretap. They include the interception of both incoming and outgoing wrong number calls where no subsequent call makes clear the purpose of the call. The wrong number calls were not characterized as "ambiguous" because, particularly with incoming calls, the purpose was presumably not narcotic—and that is not true of the calls classified as ambiguous. In addition, various calls were intercepted which were unrelated to the narcotics enterprise, but which for differing reasons based on the totality of information about the Scott-Lee-Thurmon conspiracy available to the agents *at the time* were intercepted with a reasonable expectation of related material. Certain basic facts about the conspiracy as it was known then are essential to this concept. First, the number of conspirators, the age, sex, race, economic position of many potential conspirators and whether employed or unemployed, were all unknown to the agents. Second, as the affidavit in support of the wiretap application indicates, the focus of the wiretap investigation was the out of state and international narcotics connections which appeared from the evidence gathered at that time. These locations included among others, Atlantic City, New Jersey, Philadelphia, Pennsylvania, New York City and Ecuador. Third, virtually all conversations material to the conspiracy could reasonably be expected to be conducted in coded or cloaked language. As this wiretap developed, in fact, narcotics transactions were conducted in terms which varied as to each conspirator, *i.e.*, each conspirator who dealt with Bernis Thurmon, whose phone was tapped, used a different set of terminology to communicate with Thurmon. For example, Al Spencer used the conventional boy-girl, heroin-cocaine language. I.Tr. 90,113. Red Scott, in dealing with Thurmon, however, used the terms "thing," "equipment" and others to refer to narcotics. I.Tr. 48,213. Duke Williams, in still another variation used the term "street" preceded by the number of narcotic units he was ordering, thus "put

me on Fifth Street" or "meet me on Fourth Street" indicated an order for 5 and 4 units of narcotics respectively. I.Tr. 192. Also, many calls involved innocuous conversation until the end, and concluded with an order being placed, or narcotics being discussed. E.g., I.Tr. 98,122. In sum, it is fair to say that the entire situation presented the agents with quite difficult decisions based on a substantial number of complex factors.

As an illustration of the confusion and uncertainty which the entire situation engendered, there were *two* separate arrest warrants sought and issued for the defendant Frank Scott. One was in his correct name and another in the name Alan Cole, the name in which the phone at 1230 13th Street, NW., was listed. At the conclusion of the wiretap, it was felt that these were likely two separate people.

On the basis of the factors set out above, we propose the following guidelines in determining whether individual calls were intercepted within the scope of Court authorization:

1) All calls between two known conspirators are permissibly intercepted, absent some clear showing of a withdrawal from narcotic dealings.
2) The first call between a conspirator who has dealt in narcotics over the phone and a new caller is permissible to determine whether the new caller is involved in the narcotics operation.
3) Subsequent calls between a conspirator and the "new caller" are permissibly intercepted until that person's involvement in the narcotic conspiracy may reasonably be excluded.
4) Calls to which an unidentified conspirator is a party are permissibly intercepted unless privileged to aid in the identification of the conspirator.[3]

We have applied these general principles in classifying these 55 calls as UNRE, and we submit that they were intercepted within the order's scope.

B. *The Geneva-Mother Calls*

The series of calls between Geneva and her mother were cited by the Court as "the most blatant examples" of a

[3] Section 2510(8) defines "contents" of a communication to include information concerning identity of the parties to such communication. In addition, Sections 2518(1)(b)(iv), and 2518(4)(a) require that the application and order set forth the persons whose communications are to be intercepted only if known.

failure by the agents to minimize the interception of unrelated calls. (Memorandum at 36.) We will deal with each of these calls to demonstrate how the combination of the background information known to the agents at the time, the use of cloaked language by conspirators, and various statements by the mother herself made interception of the calls reasonable under the mandate of the order.

January 26, 1970 at 1900, I.Tr. 24. The first call between Geneva and her mother was at this date and time. It was known at that time that the telephone being intercepted was listed to Geneva Thornton, Benjamin Thornton was a Thurmon alias, Thurmon had been using the phone to transact narcotic business and a female named Geneva had engaged in conversations with Thurmon on that phone, and with others from that phone. From the outset then it was reasonable to treat her as a likely conspirator. Accordingly, the first call between Geneva and any person would seem to be the permissible subject of interception, to determine whether the other person as well as Geneva, was a conspirator. In addition, Geneva speaks in the conversation about moving, and various efforts to get someone to pick up her clothing. If the assessment that it was likely Geneva was a conspirator was correct then certainly knowing when, where, and the fact that she was moving is of evidentiary value. If she was a conspirator at N Street, she could well be setting up business elsewhere if and when she moved. Also, at this time Geneva had not been identified visually. If she made arrangements to move, surveillance could be established to see whether anyone did the things which the voice of Geneva indicated she was going to do, *i.e.*, go to her mother's.

January 27, 1970 at 1604, I.Tr. 41. Here, Geneva again speaks about moving to her mother's. But early in the conversation her *mother* says that Al and two other men, Carl and Ben had called for Geneva, and that the mother had had a conversation with Al. One day earlier, Geneva had talked to a man named Ben in a call to 244-7027, a number listed to Alphonso Lee's residence on Linnean Terrace. I.Tr. 20. Thus, it was a reasonable inference when Geneva's mother indicated that Al, Ben and Carl had called, that the mother knew these people and that the Al was Alphonso Lee. In addition, on page 42, toward the bottom of the page, after the mother indicates that Bernie might be able to bring Geneva and her things over, Geneva says "he's out taking care of his business now." These facts, in

the second call between Geneva and her mother, rather than indicating that the mother was not involved in narcotics, indicated that she likely knew conspirator Al Lee, to the extent that he talked to her on the telephone, and that she knew conspirator Thurmon and might well have known about his "business." On this basis, we think that the agents were clearly justified in exploring further Geneva's calls to her mother to determine whether in fact the mother was involved as a conspirator.

January 27, 1970 at 1908, I.Tr. 44. This call followed the previous call by about three hours and consists of additional talk about Geneva's moving and whether Bernie would be able to take her. No additional information appears regarding any possible involvement of the mother, but the information is of evidentiary value in determining when, where, and whether conspirator Geneva was moving.

January 28, 1970 at 1745, I.Tr. 55. During this call Geneva and her mother discuss various matters including, but not limited to Geneva's possible move. Her mother asks her why she didn't take her medicine with her if she wasn't coming back, and Geneva says that she has "vitamin pills" where she is. This term, while in retrospect apparently innocuous here, is frequently used in narcotic circles to denote narcotics.

During the 1745 call to her mother, Geneva says that the reason Bernie didn't bring her to her mother's last night was that "he was out taking care of his business." I.Tr. 55. The last call intercepted on January 27, the day before, at 1911 was an order from Leroy Houston for "11." Bernie said, I'll "see you in 15 minutes." I.Tr. 45. Because this is of evidentiary value not only against Bernie, but because it tends to show the likelihood when coupled with Geneva's other reference to Bernie's "business" of knowledge on Geneva's part of Bernie's "business" this call is classified as mere evidence, and not as UNRE.

February 4, 1970 at 1716, I.Tr. 132. In the next call between Geneva and her mother, they talk principally about why Geneva has not been to see her mother. But the mother indicates repeatedly a secretiveness about what it is she has to discuss with Geneva and wants to talk to her in person. "I ain't gonna tell ya on the phone," her mother says. I.Tr. 133. Again she repeats "I got somethin to tell you I ain't gonna tell on no phone because *you ain't suppose talk business on the phone.*" I.Tr. 134. (Emphasis added.)

On the basis of the prior calls showing the mother's ac-

quaintance with conspirator Lee, Geneva's references in conversations with her mother to Bernie's being out taking care of "business" the agents had a basis to suspect a possibility of complicity by the mother. This call simply reinforces the suspicion, even though it appears in retrospect that the mother was not involved. Her secretiveness in talking about her "business" over the telephone was repeatedly and emphatically expressed. It is a secretiveness commonly displayed by the conspirators in this case, and indeed most people in the narcotics business. We do not contend that narcotics dealers are the only persons who display a disinclination to discuss personal business on the telephone. But the agents in executing the Court's wiretap order here, the object of which was to obtain "the participants and the nature of the conspiracy. . . ." were, we assert, authorized to intercept conversations of persons until it was reasonably clear they were *not* conspirators. Order at 2. This is especially true here, where at the time all Geneva's calls to her mother were intercepted the wiretap had shown that there was in fact a narcotics conspiracy and that Bernis Thurmon and others were using the tapped N Street telephone to conduct it.

Geneva's complicity in the conspiracy while unsettled initially became increasingly clear during the first few days of the intercept's operation until she was firmly identified as a conspirator. This occurred in the two calls intercepted immediately prior to the call between Geneva and her mother discussed here. Bernard Smith called and told Geneva that if Bernie came back before he got over there, to tell him to leave a 20 and a 40 where he could get it. In the next call Bernie called Geneva and she relayed the message. I.Tr. 131-32. Accordingly, the establishment of Geneva's participation in the conspiracy gave added weight to the interception of this call with her mother. It created the possibility that she would say something, though innocent in appearance even to her mother, that would be of evidentiary value both against herself and against other conspirators. For example she might have said to her mother that Bernie was gone over to northeast after he had received an order to deliver narcotics in northeast, or that he had gone over to K Street after he had received an order from Duke Williams who lived on K Street, SE.

February 4, 1970 at 1829. I.Tr. 136. In this call the mother tells Geneva not to come over that night because it's too cold. Mother talks about having been to the doctor about

her blood and heart, then repeats that Geneva should come to see her so they could talk; that she would not "be up there long" if she stayed with Bernie; and she again says: "I ain't going to tell you why, cause I ain't talking in no phone." I.Tr. 138.

While this call does not implicate the mother in any way it certainly does not reasonably eliminate the possibility. The continuing secretiveness leaves the situation approximately as it was at the conclusion of the prior call some hour and fifteen minutes earlier. We contend that it was clearly reasonable for the agents to intercept this call.

February 12, 1970 at 2041. I.Tr. 247. In this call Geneva and her mother talk for a considerable period of time (the transcript covers about 13 pages) about various personal matters. In the beginning her mother says that "Reds called, asked for Mama's number." I.Tr. 247. This is the nickname used by Frank Scott, the lead defendant in this case. In addition, on February 9, 1970 at 1357, Al Lee had talked to Reds, and Reds said that his mother had said Lee was supposed to bring something past there and that he should go do it. I.Tr. 441. At 1405 the same date Lee called a woman at a number listed to 163 13th Street, NW., and called her "Mom." Mom told Al that his "breakfast" was ready. Lee said: "Ok, I be over there to get it this evening Mom." Thus, the mention by Geneva's mother of Reds and "Mama's" number in the same breath, reasonably aroused the agents' suspicions. The balance of the call does not indicate any narcotic involvement by the mother. Nevertheless, we think the call was reasonably intercepted.

C. *The Bank Call*

The Court cites in its Memorandum the incoming call between a representative of the Riggs National Bank and Bernis Thurmon regarding verification of a check, as an example of a call intercepted beyond the scope of the authorizing order. (Memorandum at 35) I.Tr. 47. We respectfully disagree for the following reasons.

The enormous profits which can be derived from traffic in illicit narcotics, are, it is fair to say, the principal motivation for trafficking. Just as it is lawful for officers executing a narcotics search warrant to seize money which appears to be the proceeds of the enterprise, we contend that conversations indicating the existence of a bank account in the name of a conspirator are properly intercepted under

an order which directs the interception of conversations involving certain persons and others engaged in a narcotics operation. At the time this conversation was intercepted, extensive surveillance of defendant Thurmon had been conducted, both visual and electronic (over the tapped phone). It was reasonable for the agents to have concluded then from seeing Thurmon, and hearing him at varying times throughout several days, appearing not to work at any job, driving a Lincoln automobile, engaging in narcotics dealings virtually every day and often many different times a day, that any money he might have had then was the proceeds of his illicit narcotics business. It simply blinks reality, we submit, when the entire purpose of a narcotics enterprise is to make money, not to permit the interception of conversations concerning money within the scope of an order directed to a narcotics operation such as

• • •

There is still a separate ground upon which the interception of this call may be justified. The call is of substantial evidentiary value in that Bernie identifies himself by his true name, Thurmon, for the first time. This, of course, contributes substantially to the identification of defendant Thurmon as the speaker of the intercepted calls who identifies himself throughout as Bernie. The call also shows his wariness at acknowledging his name. He asks to know just who is calling before he does so. And then he pauses as if he has called a second person to the phone, although as the transcript notes, the same person speaks. We contend then, that the call was clearly the proper subject of interception completely apart from the financial argument above.

D. *The Geneva-Marilyn Job Call*

The Court cites the call from Geneva to Marilyn in which they discuss Marilyn's possible qualifications for a job, as an example of a call intercepted beyond the scope of the authorizing order. (Memorandum at 35) I.Tr. 148. We respectively disagree.

As we indicated earlier, on February 4, 1970 at 1640 it became clear to the agents that Geneva was involved as a conspirator. Shfle received an order from Bernard Smith for "a 20 and a 40," relayed the order to Bernie a few minutes later, and then when Smith later the same afternoon talked to Bernie and asked him if Geneva had told Bernie about him, Bernie said she had, "a forty and twenty?" Smith replied, "Yeah." I.Tr. 131, 132, 136. With

this background establishing Geneva's complicity together with the knowledge that frequently calls between conspirators involve innocuous conversation for virtually all the call, only to end with a narcotic order or discussion, we think that it is reasonable to intercept the initial call between a conspirator and any unknown person. This call, while apparently innocent, was the first call between Geneva and any female by the name of Marilyn.

In summary, our contention that there was substantial compliance with the order's direction that the intercept be conducted so as to minimize the interception of unrelated material has a three-pronged basis:

1. The limiting instructions given to and *followed* by the agents were clear efforts at minimization. The instructions applied largely, however, to situations which just did not occur.
2. The peculiar characteristics of this conspiracy were such that nearly all calls had to be intercepted to achieve the order's objective.
3. The call analysis shows that the agents' actions in executing the order resulted in seizure of an insubstantial number of calls beyond the scope of the order. (6 of 384.)

On the basis of the above, we request that the Court reconsider its ruling of April 29, 1971, and find that there was substantial compliance ' with the authorizing order.

APPENDIX

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
01/25/70							
12:01 p.m. to 6:00 p.m.	6	0	2	3	0	2	0
6:01 p.m. to 12:00 a.m.	4	0	1	2	0	0	0
01/26/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	0	5	0	1	0
6:01 p.m. to 12:00 a.m.	3	0	1	1	0	3	0
01/27/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	5	2	0	0	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	1	0
01/28/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	4	0	3	2	0	0	0
6:01 p.m. to 12:00 a.m.	3	0	0	4	0	0	0
01/29/70							
12:01 a.m. to 6:00 a.m.	1	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	1	0	0	0	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
12:01 p.m. to 6:00 p.m.	1	0	0	7	0	0	0
6:01 p.m. to 12:00 a.m.	2	1	0	3	0	0	0
01/30/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	1	0	2	0	0	0
6:01 p.m. to 12:00 a.m.	5	0	0	3	0	0	0
01/31/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	2	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	2	0	0	2	1	0	0
02/01/70							
12:01 a.m. to 6:00 a.m.	1	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	1	0	2	0	0	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	0	0
02/02/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	2	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	6	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	2	0

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
02/03/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	1	4	0	2	0
02/04/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	1	0	1
12:01 p.m. to 6:00 p.m.	5	0	0	3	0	1	0
6:01 p.m. to 12:00 a.m.	2	0	0	1	0	2	0
02/05/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	2	2	3	1
6:01 p.m. to 12:00 a.m.	1	0	0	1	0	0	0
02/06/70							
12:01 a.m. to 6:00 a.m.	0	1	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	3	0	1	5	0	0	0
6:01 p.m. to 12:00 a.m.	5	0	1	1	0	2	0
02/07/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
12:01 p.m. to 6:00 p.m.	4	0	1	2	0	3	0
6:01 p.m. to 12:00 a.m.	2	0	0	5	0	0	0
02/08/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	2	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	3	0	2	0
6:01 p.m. to 12:00 a.m.	0	0	0	0	0	0	0
02/09/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	1	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	0	1
6:01 p.m. to 12:00 a.m.	2	0	1	2	0	0	0
02/10/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	0	2	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	0	1
02/11/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	3	0	0	2	0	1	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
02/12/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	4	2	0	0
6:01 p.m. to 12:00 a.m.	9	0	0	4	0	1	0
02/13/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	1	0	1	0
12:01 p.m. to 6:00 p.m.	5	0	0	3	0	1	0
6:01 p.m. to 12:00 a.m.	1	0	0	5	0	1	0
02/14/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	2	1	0	1
6:01 p.m. to 12:00 a.m.	0	0	0	6	0	3	0
02/15/70	NO CALLS INTERCEPTED ON 02/15/70						
02/16/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	3	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	6	1	0	6	0	0	0
02/17/70							
12:01 a.m. to 6:00 a.m.	1	0	0	0	0	2	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	0	0	0	0	0	0	0
02/18/70	NO CALLS INTERCEPTED 02/18/70						
02/19/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	4	0	0	0	0	0	0
02/20/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	2	1	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	0	1	1	1	0	0	0
02/21/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	2	0	2	0	0
6:01 p.m. to 12:00 a.m.	4	0	0	2	1	3	0
02/22/70							
12:01 a.m. to 6:00 a.m.	0	0	0	2	2	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	1	1	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	1	1	1

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
6:01 p.m. to 12:00 a.m.	2	0	0	0	1	0	0
02/23/70 12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	3	1	0	1	3	3	0
6:01 p.m. to 12:00 a.m.	2	0	0	3	0	0	0
02/24/70 12:01 a.m. to 6:00 a.m.	1	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 4:00 p.m.	1	0	0	1	1	0	0

PHONES DISCONNECTED AT APPROXIMATELY 4:00 p.m.
DURING EXECUTION OF SEARCH WARRANTS 02/24/70.

TOTALS

Calls: 384	126	7	21	142	27	55	6
Percentage	32.8	1.8	5.4	36.9	7.0	14.3	1.56

ABBREVIATIONS

NS—Communications which in substance relate to the narcotics enterprise.
NP—Communications which relate to the narcotics enterprise in part.
ME—Communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value.
A—Communications so ambiguous that their purpose cannot be determined.
B—Communications consisting totally of a recorded message.
UNRE—Communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material.
UN—Communications which are unrelated to the narcotics enterprise and which were intercepted with no reasonable expectation of related material.

1974 HEARINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
vs.
FRANK R. SCOTT, et al.
} Criminal No. 1088-70

—and—

UNITED STATES OF AMERICA
vs.
BERNIS L. THURMON, et al.
} Criminal No. 1089-70

Transcript of Hearing

TUESDAY, OCTOBER 15, 1974
WASHINGTON, D. C.

Hearing on remand on the issue of minimization and other motions was commenced before THE HONORABLE JOSEPH C .WADDY, United States District Judge, at 9:41 a.m.

[72] Q. Now sir, as of the time of the requested intercept, what was your understanding of the nature of the conspiracy, that is to say, the scope of the conspiracy you were inquiring into?

A. We had some indication that the individuals involved were running a major interstate narcotics operation, both importing narcotics from overseas and diluting them for local distribution in the Washington, D. C., area.

Q. What type of narcotics?

A. Heroin.

Q. Any other type of narcotic, or dangerous drug?

A. And cocaine, also.

Q. Now at the time . . .

THE COURT: Was this your understanding at the time of the application for the wiretap?

WITNESS: That's correct.

THE COURT: Or did that information come to you subsequent to the time, or during the wiretap?

WITNESS: We suspected that the operation involved such a scope; in other words, interstate traffickers, importation of heroin and local distribution in the Washington, D. C., area.

BY MR. ADELMAN:

Q. Agent Cooper, again referring you to the time of the initial application, do you recall the identity of any of [73] the persons whom you at that time knew were involved in this conspiracy?

A. At the time of the original affidavit?

Q. Yes.

A. Well, it was Alphonso Lee. The individual I identified at that time was Alphonso Lee, Bernis Thurmon, Frank Scott, and there were other individuals who were not subsequently indicted.

Q. Now sir, did you in the course of the intercept have occasion to, yourself, listen-in to certain conversations intercepted?

A. Yes, sir, I did.

Q. And what—did anyone else do that, sir?

A. Yes, they did.

Q. Who did that?

A. Agents of the Drug—of the-then Bureau of Narcotics and Dangerous Drugs.

Q. Were you there supervising, sir?

A. Yes, I was.

Q. Now during the time the intercept was in effect, that is, the intercept both for the Thornton telephone, or the Jenkins telephone, and the Lee telephone, did it come to your attention that any other additional persons, or new persons, unknown to you originally who were member of the conspiracy?

[74] A. We were able to identify numerous other inidividuals who were subsequently indicted.

Q. Do you recall any of their names, sir?

A. Yes, sir, it would be Chloe Daviage, George Jenkins, Reginald Jackson, Evelyn Abston, Alfred Spencer.

Q. Now precisely how was it that these people were brought to your attention?

A. They are identified through the operation of the intercept.

Q. Now during the pendency of the intercept, did you have any change in judgment as to the scope of the conspiracy?

A. Well, we realized that the—we were concerned with many customers, with the local purchases located within the Washington, D. C., area, many more than we had assumed.

Q. Did you notice any other differences in the conspiracy that you discovered on the wiretap than from what it was originally conceived to be?

A. Would you repeat that?

Q. Yes. Did you notice any other differences in the conspiracy as it evolved over the wiretap than it was originally conceived to be before you got the wiretap?

A. Well, we were able to—as I said, we were able to identify individuals that we did not know about originally and we were able to identify someone whom we assumed to be [75] the principal figure in the conspiracy. But this—in effect, this did not come about until substantially the period for which we had been authorized had been completed.

Q. During the period of the intercept?

A. That's correct.

Q. Now sir, during the period of the intercept, were any surveillance efforts undertaken?

A. Yes, they were.

Q. Would you describe those, please?

A. On many occasions, the telephone would—a telephone call would be placed to a location and if we had the listing for that telephone number, we were able to supply police officers in order to surveil the possible meeting, or whatever was being arranged; or when the telephone call was made and there was some indication that the caller was going to meet someone at a certain location, we would, also, attempt to surveil the meeting in order to see if any narcotics was transferred, or to identify the individuals involved.

Q. Now sir, during the course of the intercept, did you notice the use of any code words, or disguises by the callers?

A. Yes, we did.

Q. Would you describe those to His Honor, please?

A. Well, there was numerous code terms used. It appears that certain individuals who became identified as [76] callers, or customers, or suppliers, or whatever, would use their own terminology; not everyone used the same type

of terminology. Once this terminology had been learned by us, that is, by agents of the Bureau during the operation of the wire intercept that had been completed not too long before this one, so we were alert for this type of language.

Q. What was the name of that wire intercept case?

A. That was the Jackson-Tantillo wire intercept.

Q. Did you participate in that, sir?

A. Yes, I did.

Q. About what period of time did that wiretap cover?

A. It was begun in August of 1969. . .

MR. DREOS: If Your Honor please, I would question the relevancy of the testimony relating to some other case in connection with this case.

THE COURT: The objection is overruled.

BY MR. ADELMAN:

Q. Thank you. Would you continue your answer?

A. That intercept began in August of 1969 and continued for about 30 days.

Q. Could you give us some examples of the code words, the code languages that were used by the participants in this conspiracy?

A. Well, probably the most common terminology used was the male-female gender type adjectives, any type of [77] adjective denoting the male gender would be used for heroin, such as "boy", "man", "son", "nephew", things of this nature. Any type of female gender name would be used to describe cocaine, such as, "girl", "neice", "broad", things of this nature.

Q. Now have you concluded?

A. Well, there were others, as many as other terminology as . . .

Q. Would you briefly describe those for this Court?

A. All right, when ordering a quantity of narcotics, certain callers would say, "one thing", or "one and one" and to the listening agents this meant that "one thing" would mean one quantity of whatever that particular customer normally purchases; "one and one" would mean one of each type. In other words, there would be no need to identify the type of drug, specifically because the caller would know what the terminology is and the person on the other end of the line would also know what the terminology is.

Q. Agent, did the term, or phrases, "Fifth Street" and "Fourth Street" come to your attention during this intercept?

A. That's correct, it did.

Q. What significance . . .

MR. DREOS: I object to the leading question.

MR. ADELMAN: It's not a leading question.

[78] THE COURT: The objection is overruled.

WITNESS: We came to determine that this was an indication for a quantity that the caller or the customer wanted. If you said, "Put me on Fifth Street", that meant he wanted five quantities of that particular narcotic drug that was ordered.

BY MR. ADELMAN:

Q. Now sir, you indicated that you participated in the "Slippery Jackson" intercept, is that correct?

A. That's correct.

Q. And did you apply any of your experience, or knowledge of that intercept to your operation on this one?

A. Yes, we did.

[87] Q. Finally, sir, let me direct your attention in the transcript, the collection of calls of the telephone conversations between Geneva Jenkins and her mother. Have you had occasion to examine those?

A. Yes, I have.

Q. When was the last time you did that?

A. Last evening.

Q. Now do you have an opinion as to the value or the use of those calls in the investigation of the conspiracy that you have described?

A. Yes. I feel that most of those calls between the [88] conspirator, Geneva Jenkins, and her mother contained language and terminology that have been used—some of the language and terminology, we know, has been used in the past to denote narcotics, narcotic paraphernalia, and things of this nature. Not only that, there were indications where the mother, apparently, was aware of the operation of one of the conspirators, namely, Mr. Thurmon. She was familiar with Mr. Lee and another individual that was mentioned in a conversation who, apparently, had been at Mr. Lee's residence some time before. I feel that we had reason to believe that she had knowledge of—at least had reason to suspect that she had knowledge of the conspiracy.

MR. ADELMAN: That's all I have. Thank you.

MR. PALMER: May I inquire, first, Your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MR. PALMER:

Q. Now you just indicated—just taking the last part, you indicated that from your reading last night, or thereabouts of conversations between Geneva Jenkins and her mother, you have reason to believe that Geneva Jenkins' mother was familiar, at least, with one aspect of the narcotic conspiracy, is that correct?

A. That's correct.

Q. Now you—when you testified after the tap was [89]over in this Court on April 16, 1971, and you were asked a question by me . . .

MR. ADELMAN: Mr. Palmer, what page?

MR. PALMER: Page 323. (Quoting) "Question: Was Geneva Jenkins' mother at all the object of your inquiry; was she in any way shape, or form, thought to be involved in a narcotics conspiracy?" "Answer: We didn't have any knowledge one way or the other." Is that correct?

WITNESS: That's correct.

BY MR. PALMER:

Q. But now you're saying after review, you've come up with this knowledge, that she had some knowledge of the conspiracy? Is that correct?

A. I'm saying that through analysis of the transcript of the phone calls between Geneva and her mother, I have every reason to believe now, you know, that there is grounds for suspicion that she did.

Q. Now Agent Cooper, in the first tap you spoke about, the so-called Jackson Tap, was your role a supervisor in that?

A. It was not.

Q. What was your role in that tap?

A. I was an agent assigned to a regular shift on the intercept.

Q. Six or eight hours a day, you were on the phones listening, right?

[90] A. Tweleve hours a day.

Q. Tweleve hours, all right. In this case, was your role any different? What was your role in this case?

A. I was the supervising agent. By that, I was not there 24 hours a day, but I spent a great deal of every day at the intercept.

Q. And in fact, you applied for, or submitted the affidavits in this case, is that correct?

A. Yes. I did.

Q. Now the affidavit you submitted was on January 24th of 1970, is that correct?

A. I believe so, yes, sir.

Q. And you worked very closely with Mr. Sullivan of the Major Crimes Unit in preparing affidavit and throughout the course of this wiretap, is that correct, sir?

A. That's correct.

Q. Was he the direct supervising Assistant United States Attorney in charge of this wiretap?

A. Yes, he was.

Q. And you, personally, made reports to him, is that correct?

A. That's correct.

Q. All right. Now prior to obtaining the wire tap order on January 24th from Judge Smith, did you and Mr. Sullivan have any discussions concerning limitations on what would be [91] overheard?

A. Yes, we did.

Q. And when did that discussion with Mr. Sullivan occur?

A. I have no way of pinpointing exactly when the discussions occurred, but I do know that we had such discussions prior to that.

Q. And who was present at these discussions?

A. I'd be guessing.

Q. And what was concluded as a result of these discussions?

A. That there was a certain—there were certain categories of telephone calls that should not be listened to.

Q. And what were they, sir?

A. These fell into restricted areas. These were telephone calls between an attorney and his client in a discussion of a pending case . . .

THE COURT: What was that second thing?

WITNESS: An attorney and his client in the discussion of a pending case.

THE COURT: Oh, I see.

WITNESS: (Continuing) The priest-penitent relationship and doctor-patient relationship. All of these were restricted conversations and were not to be intercepted under the law.

[92] By Mr. Palmer:

Q. Those were the three categories that were not to be intercepted, is that correct?

A. Correct, sir.

Q. All other calls were to be intercepted and recorded 24 hours a day, is that correct, sir?

A. Those were not the specific orders.

Q. Well, what were the specific orders, Agent Cooper, if you had any orders?

A. The orders were to listen to the telephone call, to begin to listen—first of all, this is long after we have been able to determine who the individuals are which—who are calling regularly on the intercept. There is a period of time where . . .

The Court: Wait a minute . . .

Mr. Palmer: Excuse me, . . .

The Court: . . . before you leave that, let me be clear. Are you saying that these discussions as to limitation of the calls was after you had discovered from prior listening who the persons were?

Witness: No, no—my discussions with the Assistant U.S. Attorney? Mr. Sullivan?

The Court: Yes.

Witness: Prior to the intercept.

The Court: Before the intercept ever . . .?

[93] Witness: Yes, sir.

The Court: Well, what did you mean by your last answer there, that you gave, that this was after you had discovered who some people were?

Witness: Well, I was trying to further explain the problem that the agents face when it comes to placing limitations on recording a conversation.

Mr. Palmer: If I may get back to my question, if Your Honor please.

The Court: Yes.

By Mr. Palmer:

Q. The only instructions you had, sir, if I understand you correctly, is that the only calls you were not to monitor were attorny-client concerning a pending case, (1); (2) priest-peritent, and (3) a doctor and his patient, is that correct?

A. There were other instructions, if I can articulate them; in other words, if there was a call that appeared to us to be privileged, but we could not categorize it, we should make a

note of it and see that the information got to myself, or delivered to the Assistant U.S. Attorney, Mr. Sullivan, as soon as possible.

Q. What were those instructions?—this was before the tap started now, right?

A. Yes.

[94] Q. All right. What other instructions did you receive from Mr. Sullivan concerning limitation on calls?

A. I have just given you exactly what I represented to the agents, that if a call should come in that doesn't fall into those categories that appears to be, let's say, totally out of the realm of the purpose for which we were suppose to be on the line, that we should record the call, make a note of it and pass the information on to Mr. Sullivan through me.

Q. All right. So in any event, regardless of the nature of the call, even if they were, in fact, totally non-narcotic-related, you were to record them, preserve them and then report this to Mr. Sullivan, is that correct, sir? Isn't that what you just said?

A. No, I'm not saying if they are totally non-narcotic-related. That was the area where we were suppose to have an eye on.

Q. Let me ask you this, Agent. Now I believe you indicated that you instructed the agents that if there was an area of calls that appeared to be non-narcotic-related—right?—not related to this alleged conspiracy, they were to be alerted to that fact, is that correct?

A. That is correct.

Q. And being alerted to the fact, they were to record the conversation, make a recording of it, and then alert [95] Mr. Sullivan of that fact, is that correct?

A. Basically, yes.

Q. All right. So what I'm saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics-related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir?

A. Basically, that is correct, sir.

Q. That is correct, sir, is it not?

A. Basically, yes.

The Court: When you say, "basically", let's find out what they were. I don't understand these qualifications. I'm trying to find out what were the instructions.

WITNESS: Well, of course, the only difference is that I would not explain it that way, what Mr. Palmer is saying . . .

THE COURT: Well, explain it your way.

WITNESS: Well, we knew of occasions where telephone calls may be placed and that it would be difficult to determine whether it was narcotic-related, or not. We assumed that once the agent manning the tap developed some area of expertise in determining what is a narcotic-related call and what is not a narcotic-related call, that there should come a time when a call would come in that they might determine is non-narcotic-related and these are the calls that [96] we were addressing. This is what we were talking about.

THE COURT: I'm still not clear. Are you saying that apart from the three absolute categories, that the listener was to record all calls; those that were narcotic-related were so classified and those that were ambiguous were turned over to you and Mr. Sullivan? Is that what you're saying to me?

WITNESS: Not exactly, Your Honor.

THE COURT: Well, what are you saying?

WITNESS: My whole question, or the answer to this question goes to other foundations that, I think, should be laid . . .

THE COURT: Other what?

WITNESS: A foundation that I think should be laid before I answer the question . . .

THE COURT: Well, lay the foundation and answer the question.

WITNESS: It's a very difficult matter for agents initially involved in a wire intercept to make such determinations right off the bat, towards the beginning of the intercept, as to basic things, such as, just what is a narcotics-related conversation, who are the individuals involved, what exactly are they talking about. These are things that do not become apparent until some time after the intercept has been in operation. This was my experience in [97] Jackson and this, again, was my experience in this particular instance.

THE COURT: All right. Now what do you do in those circumstances?

WITNESS: In the beginning of an intercept?

THE COURT: Yes.

WITNESS: You listen to the call.

THE COURT: Everything?

WITNESS: Well, yes as though . . .

THE COURT: All right—everything, except these three?

WITNESS: That's correct, sir.

THE COURT: All right, no does there ever come a time when you change that procedure and if so, when?

WITNESS: Of course, it was never stated the way I'm explaining it, Your Honor, but . . .

THE COURT: There was what?

WITNESS: The prohibition that I am trying to explain now was never stated the way I am explaining it; but being that I was very close to the situation, I can attest that this was the case, that we were aware of the prohibition against non-related calls, but . . .

THE COURT: Assuming that you were aware of it, what we're trying to find out is when did you put it in operation? [98] WITNESS: Well, . . .

THE COURT: The limitation, that is.

WITNESS: . . . in effect, Your Honor, there were no limitations placed on the interception of calls in this particular operation, in this particular instance.

THE COURT: Well, I believe I asked you that question at a hearing in 1971 and you answered the same way. . .

WITNESS: Yes, sir.

THE COURT: . . . that you monitored every call.

WITNESS: Yes, sir, with the exception of . . .

THE COURT: Or the effect of it was, I believe I asked you whether you had knowledge of *any steps* taken by any agent, or by yourself, to limit the calls and I believe your answer was that you knew of none.

WITNESS: That's correct.

THE COURT: Is that still your answer?

WITNESS: Yes, it is.

Tr. 140—41

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THE COURT: Agent Cooper, you have testified that you assisted Mr. Kellogg in the preparation of this "Call Analysis", is that correct?

WITNESS: Your Honor, I said that I helped him in the preparation of the transcripts, the typewritten transcripts from the tapes. I did not sit down with him on this "Call Analysis".

THE COURT: Well, in this "Call Analysis", there are a number of categories that are set forth, "NS", meaning

narcotics in substance, it says; "NP", narcotics in part; "ME", mere evidence; "A", ambiguous; "R", a recording where all you got was a recording; "UNRE", which is unrelated but you listened with reasonable expectation to find something related to narcotics, and then "Unrelated", period. Who devised those categories?

WITNESS: Mr. Kellogg, I believe.

THE COURT: Beg your pardon?

WITNESS: I believe Mr. Kellogg did.

THE COURT: Did you assist him in devising those categories?

WITNESS: No, sir, I did not.

THE COURT: You did?

WITNESS: I did not.

THE COURT: Well, do you know where he got the information to place in each of those categories?

WITNESS: He got the information from the transcripts of the tapes.

THE COURT: And not from any of the reports that you had made to Mr. Sullivan?

WITNESS: I don't believe so, sir. I think he got the principal amount of his information from the transcripts of the tapes that were made and added to, just prior to the hearing three years ago.

THE COURT: And this was after the fact?

WITNESS: That's correct.

Tr 222—23

Q. What I'm asking you, sir, is whether or not you are aware that in the Court of Appeals, the Government counsel conceded, or took the position, sir, that the transcript of intercepted calls at the N Street premises revealed a local narcotic distribution setup?

A. Yes, sir.

Q. Now is that position, sir, in accord with your own assessment of what the transcript of those calls, that is, the N Street calls showed, sir?

A. Yes, sir, it is.

Tr. 308—09

Q. And is it fair to say that based on an analysis of those reports, that approximately—but 40 percent of the calls as you analyzed them at the time were related to narcotics, or narcotics transactions?

A. I'd say 40 percent of the calls that I reported, I cannot say that I analyzed all of the calls at that time.

Q. And 60 percent were unrelated to the narcotics conspiracy, or the enterprise, is that correct?

A. According to our analysis at that time.

Q. But you're saying that the analysis of 60 percent might not have been all inclusive, might not have covered all of the calls, is that correct?

A. I was speaking about my own personal interpretation of each and every call.

Q. However, of all the calls, approximately 500 that were intercepted, is it fair to say that in your judgment, approximately 60 percent, as the Court had found in the prior hearing, were unrelated to narcotics, or narcotic transactions?

A. Based upon our original assessment, yes, sir.

Q. In fact, on June 24th—I'm sorry, February 24th of 1970, when you applied for a search warrant for 1425 N Street, Northwest—(handing document to witness) that is your affidavit for that search warrant, is it not, sir?

A. (Examining document) Yes, sir, it is.

Q. And in it you state there were approximately 500 conversations intercepted and recorded. Of these conversations, approximately 40 percent were related to narcotics and narcotics transactions, is that correct, sir?

A. That is correct.

Q. And that purported to analyze all of the calls in this case, is that correct?

A. Yes, sir, I believe it did.

Q. And 60 percent of the calls, therefore, as Judge Waddy had found, were unrelated to narcotics, or narcotic transactions, is that correct?

A. They were found to be unrelated, yes.

Q. They were found to be unrelated, is that correct?

A. That's correct.

THE COURT: Now did there come a time when you changed your idea about the characterization of these calls?

WITNESS: Well, yes, sir, there did.

THE COURT: When was that?

WITNESS: Prior to the hearings which were scheduled in April of 1971, sir. I did. . .

THE COURT: Prior to which hearing, the original suppression hearing, or the motion to reconsider?

WITNESS: Well, the suppression hearing; that's the only hearing at which I personally gave testimony, as I recall.

PHILIP L. KELLOGG took the stand, and being duly sworn, was examined and testified as follows:

Tr. 352

A. It was prepared between the end of April 1971, and the end of May 1971.

Q. And did you work on the preparation of that particular document?

A. I did.

Q. Did you have any direct assistance in the preparation of that document?

A. From any other person, no, sir.

Q. Now why was that document prepared by you?

A. There were extensive hearings before this Court in April of 1971 to develop the factual basis which underlay various motions which had been filed on behalf of various defendants in the case. I believe it was on the 27th of April, 1971, that this Court issued a written opinion—ruling on all of those motions and granting the defense's motion to suppress all of the evidence in the case which flowed from these intercepts, on the basis of a ruling that there was a violation of the so-called minimization clause in the federal wiretap statute.

Subsequent to that ruling and on the basis of my own analysis of the Court's opinion and in consultation with my superiors and other members of the United States Attorney's Office who had participated in similar proceedings, but other cases, I undertook to prepare a detailed call-by-call analysis of the intercepted communications in this case. I did so—let me strike that and simply say that it seemed to me in analyzing the Court's opinion that the Court relied heavily upon the factual assertion that 60 percent of the calls were unrelated to narcotics, an inference which flowed from that; that the interception of those 60 percent of the calls was impermissible, that is, unlawful pursuant to the terms of the order in the statute. It was that factual matter that I sought to get at and I add candidly that obviously as an advocate, I did represent the United States in that proceeding.

Q. Now in the course of this investigation, did you come to know an individual, Special Agent Cooper, from the [354] Bureau of Narcotics and Dangerous Drugs?

A. Yes, sir.

Q. Did he play any part in the formulation of the "Call Analysis"?

A. No, sir.

Tr. 370

THE COURT: Now that's the question I want to ask you. Do I understand then that these categories are the sole result of a determination by the legal staff of the United States Government setting forth the litigation stance of the United States and not the result of any evidence, or any assistance given by anyone who participated in the wiretap?

WITNESS: Well, yes, sir, I think that's correct. I prepared them. First of all, as I've indicated in my testimony, I prepared them and largely alone. I did so, (1) the categories were constructed by myself on the basis of consultation with my superiors and on the basis of the similar categories which had been utilized in advance of Judge Robinson in the Tantillo Case. The basic factual material, of course, that I utilized in—that I analyzed were the transcripts which, of course, had been prepared by the investigative personnel. But it is certainly correct that these categories and the analysis of the calls as such were prepared by myself and they are not the product of the investigative personnel, except to the extent that I relied on their transcriptions of the calls and occasionally assistance to discern the meaning of a particular call.

Tr. 373

WITNESS: I understand. And furthermore, it has been stipulated from the beginning that there are no calls in this entire intercept which were not intercepted as a discretionary matter. It's undisputed that every single call that came over the line was intercepted.

Tr. 435—36

Q. Now I believe your last answer was that no agent was consulted, no federal narcotics agent, in constructing the 7 categories of your "Call Analysis"?

A. That is correct, Mr. Palmer, but I guess I have to add this caveat. I hate to qualify everything, but as I indicated in my testimony on direct examination, I prepared the categories, constructed them after a fairly detailed analysis of the materials that had been prepared in the Tantillo Case and also after a consultation the various members of the

United States Attorney's Office who had responsibility for that matter. In their preparing the categories, which are essentially the same, they may well have had consultation and advice of narcotics agents, but I had none of substance, with Agent Cooper, or anyone else related to this tap.

Q. And the other U. S. Attorneys, you have no knowledge that they, in fact, consulted with any agents? You're just speculating, they may have, you said, is that correct?

A. Yes, indeed.

Tr. 441—42

Q. Now as agents manning a tap get the information over the intercept, as it is coming in, did you know at the time you constructed this analysis as to what categories they were using insofar as including or excluding calls as unrelated to the narcotic enterprise, they actually did it at the time the tap occurred?

A. My only answer would be is that I was unaware of any such categories—the use of any such categories on their part.

Q. In other words, when you went through your analysis, I don't know, 6 or 8 months after the tap concluded, had you interviewed any agents who were manning the taps at the time in determining what they, in fact, included as part of what they were authorized to receive, and that part they excluded from what they were authorized to receive? In other words, for example, we have in evidence Agent Cooper's report to Harold L. Sullivan, Exhibit No. 2, dated January 26, 1970, in which it was reported that there were a total of 17 conversations; of these, 8 involved narcotic transactions. Now did you attempt to go to the original agents insofar as each of the day's tap proceeded and determined what they, in fact, in their own categories considered narcotic, narcotic-related, or unrelated to the criminal enterprise?

A. No.

Q. In other words, your construction was strictly an attorney's without any relationship to what the agents in life and in fact did, is that correct, sir?

A. Yes, without respect to any standards they may have used, yes.

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Tr. 449

Q. And so is it fair to say that the "Call Analysis" as constructed by the Government at the time is totally unrelated in fact by virtue of discussion, or otherwise, totally unrelated to what may, or may not have been going on in the agents' mind as they actually intercepted these calls?

A. Yes, they contained—the "Call Analysis" contains my judgment and not the judgments of any agents.

Tr. 680—81

GLENNON L. COOPER again resumed the stand, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Agent Cooper, at a hearing—at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A. That is correct, Your Honor.

Q. And also that there were times when you, yourself, did the listening?

A. That's correct.

Q. The question I wish to ask you is this, whether at any time during the course of the wiretap—of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A. That is correct, Your Honor.

SUPREME COURT OF THE UNITED STATES

No. 76-6767

FRANK R. SCOTT, etc. and
BERNIS L. THURMON, etc.

Petitioners,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition. The parties are also directed to brief and argue the question of standing.

October 11, 1977

☆ U. S. Government Printing Office: 1977—231-483/106

Nos. 76-6637 and 76-6767

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CHLOE V. DAVIAGE, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK R. SCOTT and BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6637

CHLOE V. DAVIAGE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6767

FRANK R. SCOTT and BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The initial opinion of the district court (Pet. App. A13-A29)[1] is reported at 331 F. Supp. 233. The first opinion of the court of appeals (Pet. App. A30-A35) is reported at 504 F. 2d 194. The district court's findings and conclusions on remand (Pet. App. A36-A43) are unreported. The second opinion of the court of appeals (Pet. App. A44-A53) is reported at 516 F. 2d 751. The order of the court of appeals denying rehearing en banc (together with a dissenting opinion) (Pet. App. A54-A55) is reported at 522 F. 2d 1333. The opinion of the court of appeals affirming petitioners' convictions (Pet. App. A7-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari in No. 76-6767 to and including May 28, 1977. The petitions for a writ of certiorari were filed on April 27, 1977 (No. 76-6637) and May 19, 1977 (No. 76-6767). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ Unless otherwise noted, "Pet. App." references are to the appendix in petition No. 76-6637.

QUESTIONS PRESENTED

1. Whether, in the court-authorized electronic surveillance of an extensive narcotics operation, the government failed to minimize the interception of irrelevant conversations although a particularized analysis of the intercepted calls showed that it was reasonable to intercept all of them.

2. Whether the affidavit supporting the government's application for an interception order adequately set forth the reasons why normal investigative procedures were unlikely to succeed or too dangerous to undertake (No. 76-6637).

3. Whether petitioners were denied their right to a speedy trial.

STATEMENT

Following a nonjury trial on stipulated facts in the United States District Court for the District of Columbia, petitioner Daviage was convicted of using a telephone to violate federal narcotics laws, in violation of 18 U.S.C. 1403; petitioner Scott was convicted of the sale or purchase of narcotics not in the original stamped package, in violation of 26 U.S.C. 4704(a); and petitioner Thurmon was convicted of conspiracy to sell narcotics, in violation of 26 U.S.C. 7237(b) and 4705(a). Petitioners Scott and Thurmon were each sentenced to ten years' imprisonment; petitioner Daviage was sentenced to three years' imprisonment, all but six months of which was suspended, to be followed by three years' probation. The court of appeals affirmed (Pet. App. A7-A12).[1]

1. The charges of which petitioners were convicted were based upon evidence derived from court-authorized electronic surveillance conducted in January 1970, pursuant to a judicial order authorizing federal and local law enforcement officials to intercept wire communications of petitioner Thurmon, co-conspirator "Alphonso

1/ The statutes under which petitioners were convicted were repealed in connection with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1292.

H. Lee,"[2] and others unknown, over a telephone listed in the name of "Geneva Thornton"[3] and located at premises on N Street in Washington, D.C. The order authorized the monitoring agents to intercept conversations relating to a conspiracy illegally to import and distribute narcotics, and, as required by 18 U.S.C. 2518(5), directed that the monitoring be conducted in such a way as to minimize the interception of innocent conversations (Pet. App. A31). The interceptions occurred between January 25 and February 24, 1970.[4]

The monitoring agents intercepted and recorded in their entirety all of the 384 completed in-coming and out-going calls made during the thirty-one day period of electronic surveillance on

2/ Albert Lee, a/k/a "Alphonso H. Lee," named in the interception order, subsequently was indicted and convicted together with petitioners. His appeal is now pending in the court of appeals (No. 76-1092).

An affidavit accompanying the application for the interception order explained that normal investigative techniques, including reliance on a reliable informant who had been employed by Lee in the retail distribution of drugs, had been unsuccessful in revealing the identity of a "silent partner" in Lee's narcotics operation, and had failed to uncover the operation's source of supply, as well as the "factory" where the narcotics were "cut" and packaged. According to informants, the conspirators had avoided physical surveillance through careful selection of purchasers and sellers, frequent changes in meeting places, and the use of motorcycles by messengers. The affidavit also noted that Lee was extremely cautious, appeared to be constantly on the alert for law enforcement surveillance, and varied his pattern of activities in order to avoid detection.

Telephone toll records had been obtained in an effort to trace the bounds of the conspiracy. The agents believed, however, that many of Lee's dealings were conducted through local telephone calls that would not be noted on the toll records.

We have lodged a copy of the affidavit with the Clerk of this Court.

3/ "Geneva Thornton" was an alias used by Geneva Jenkins, a co-defendant in this case (Pet. App. A31, n. 1).

4/ While the intercept application requested authorization to conduct the interception for a twenty-day period, through a typographical error the order authorized interception for thirty days. The original order was only executed for twenty days, however, and on February 13, 1970, an application for an eleven-day extension of the intercept was approved (Pet. App. A32, n. 3).

Between February 4 and February 24, 1970, pursuant to judicial orders, government agents intercepted conversations of the conspirators over two other telephones, located at 5195 Linnean Terrace in Washington, D.C. The record contains no evidence concerning the manner in which these interceptions were conducted, and they are not at issue here.

the telephone at the N Street premises.[5] The agents were instructed not to listen to or record "privileged conversations," such as those between attorney and client, but no such calls were monitored and thus the opportunity to minimize in this respect never arose (Pet. App. A48-A49, n. 9).

2. Petitioners and eleven co-defendants were indicted on June 24, 1970. Extensive discovery and numerous defense motions followed. On April 29, 1971, the district court granted a defense motion to suppress the intercepted conversations, ruling that the monitoring agents had failed to minimize the interceptions of innocent conversations (Pet. App. A26-A28). The court noted that all conversations were intercepted in their entirety, and that written reports that were submitted by the monitoring agents to the authorizing judge during the execution of the interception characterized 40% of the intercepted calls as narcotics related and the remainder as non-narcotics related (Pet. App. A27, A34).

The government moved for reconsideration and, as an aid to judging the reasonableness of the interceptions, presented a "call analysis" consisting of a breakdown of the intercepted conversations into various categories (Pet. App. A35). The district court denied the motion for reconsideration without opinion on June 25, 1971.

The government appealed. After extensive briefing by both sides the case was argued in the court of appeals on December 19, 1972. That court deferred its decision pending its disposition of the already pending appeal in United States v. James, 494 F. 2d 1007 (C.A.D.C.), certiorari denied, 419 U.S. 1020, which also presented the issue of minimization (Pet. App. A10-A11, A31, A46).

On June 27, 1974, the court of appeals vacated the suppression order and remanded the case for an assessment of the reasonableness of the monitoring agents' conduct "on a considerably more particularized basis" (Pet. App. A34) than that previously made by the district court.

5/ At one point during this period the agents ceased the interceptions when they realized that their equipment was connected to the wrong telephone line (Pet. App. A48-A49, n. 9).

The court ruled that the fact that 60% of the intercepted conversations ultimately proved to be non-narcotics related did not necessarily mean that the monitoring agents had acted unreasonably in intercepting them at the time (Pet. App. A34-A35). It directed the district court "to accept the [government's] call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question" (Pet. App. A35), and to reassess the reasonableness of the agents' conduct in light of the court of appeals' intervening decision in United States v. James, supra.[6/]

Following evidentiary hearings on remand, the district court again ordered the calls suppressed. The court found no errors in classification in the government's call analysis, but reiterated its view that total interception of all conversations was unlawful, declaring that the monitoring agents' "conduct would be unreasonable, even if every intercepted call were narcotics related" (Pet. App. A42).

On expedited appeal, the court of appeals (on July 25, 1975), after noting the lengthy period that had elapsed since the commission of the offenses in question, undertook its own review of the intercepted conversations (Pet. App. A46). It ruled (Pet. App. A51) that there was "no category of conversations which would have required the institution of a minimization procedure by the monitoring agents, and appellants have identified none* * *." The court accordingly concluded (ibid.) that, "under the particular facts of this case," the extent of surveillance was not unreasonable. It therefore reversed the suppression order and remanded the case to the district court with the suggestion that petitioners and their co-defendants be brought to trial as quickly as possible (Pet. App. A46, A53). Two weeks later petitioners filed a petition for rehearing with a suggestion for rehearing en banc, which was denied on October 3, 1975 (Pet. App. A54). Petitioners then filed a petition for a writ of

6/ In James, the court of appeals enunciated several factors to be weighed in judging compliance with the statutory minimization requirements, including (a) the scope of the criminal enterprise involved, (b) the extent to which the subject telephone was being utilized in the illicit activity, (c) the government's expectation as to the contents of the calls, and (d) the extent of judicial supervision exercised over the execution of the wire intercept (494 F. 2d at 1019-1021).

certiorari on November 3, 1975, which was denied by the Court on April 5, 1976 (425 U.S. 917; Pet. App. A56).

Upon remand to the district court, petitioners moved to dismiss the indictments on the ground that they had been denied their right to a speedy trial. This motion was denied and, on July 12-14, 1976, they were tried before the court on stipulated evidence (Pet. App. A8).

ARGUMENT

1. Petitioners contend that in executing the surveillance order the monitoring agents did not adequately minimize the interception of innocent conversations.

a. Although each petitioner was overheard during the execution of the order, only petitioner Thurmon was a party to intercepted communications that were non-narcotics related (Pet. App. A32). Accordingly, only he has standing to seek suppression on the ground that the government failed to minimize the interceptions. All of the intercepted calls to which petitioners Daviage and Scott (who were not subscribers to the monitored telephone) were parties related to the conspiracy to distribute narcotics, and hence they lack standing to raise the minimization issue.

In enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress did not intend to grant broader standing to challenge assertedly illegal governmental intrusions than is conferred by the law of search and seizure generally.[7/] See S. Rep. No. 1097, 90th Cong., 2nd Sess. 91, 106 (1968); Alderman v. United States, 394 U.S. 165, 175-176 n. 9; United States v. Scully, 546 F. 2d 255, 268 (C.A. 9), certiorari denied, No. 76-5918, April 18, 1977; United States v. Armocida, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied sub nom. Conti v. United States, 423 U.S. 858; United States v. Bynum, 513 F. 2d 533, 534-535 (C.A. 2), certiorari denied, 423 U.S. 952.

7/ Indeed, although it rejected the government's standing argument, the court of appeals recognized that Congress intended to keep the statutory suppression remedy within the scope of traditional search and seizure law (Pet. App. A33).

Thus, since "Fourth Amendment rights are personal rights which * * * may not be vicariously asserted" (Alderman v. United States, supra, 394 U.S. at 174), petitioners Daviage and Scott may not urge suppression on account of alleged misconduct that did not violate their rights. See United States v. Fury, 554 F. 2d 522, 526 (C.A. 2), certiorari petition pending, No. 76-6828; United States v. Hinton, 543 F. 2d 1002, 1011-1012 n. 13 (C.A. 2), certiorari denied sub nom. Carter v. United States, 429 U.S. 980; United States v. Ramsey, 503 F. 2d 524, 532 (C.A. 7), certiorari denied, 420 U.S. 932; United States v. Poeta, 455 F. 2d 117, 122 (C.A. 2), certiorari denied, 406 U.S. 948.

b. The court of appeals correctly rejected petitioners' minimization claims. In its second opinion in this case, it noted that the minimization requirement of 18 U.S.C. 2518(5) does not require the monitoring agents to decide whether to terminate interception of each individual conversation. Instead, "the only feasible approach to minimization is the gradual development, during the execution of the particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. * * * Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization" (Pet. App. A47-A48; footnote omitted). Accord, United States v. Daly, 535 F. 2d 434, 440-442 (C.A. 8); United States v. Chavez, 533 F. 2d 491, 494 (C.A. 9), certiorari denied, 426 U.S. 911; United States v. Quintana, 508 F. 2d 867, 873 (C.A. 7). The court then carefully analysed the calls intercepted and concluded that, on the particular facts of this case, no such categories of innocent conversations had appeared, and thus that the agents did not act unreasonably in intercepting all of the conversations (Pet. App. A51).[8/] There is no

8/ The court found that petitioners were involved in a relatively extensive narcotics business; that the conspirators used coded language and occasionally discussed irrelevant matters at the outset of a narcotics-related conversation; that the subject telephone was heavily used in the narcotics business; that in the course of the interception the agents discovered that the operation was different in nature (though not lesser in scope) than originally believed; and that the authorizing judge was given periodic reports concerning the number of calls intercepted and the number of those which were narcotics-related (Pet. App. A51-A52).

need for further review by this Court of this essentially factual determination.[9/]

Petitioner Daviage argues that the court of appeals rendered the subjective intent and possible "bad faith" of the agents in failing to minimize completely irrelevant and thus created a conflict among the circuits (Pet. No. 76-6637, pp. 7, 9-10). We disagree with both claims.

The court below did not make the agents' intent irrelevant. On the contrary, it expressly stated that intent "is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied" (Pet. App. A49), and that, while the objective reasonableness of the interceptions is the decisive factor, the subjective intent of the agents is nonetheless relevant, since if the agents fail to manifest a high regard for the right of privacy the government will "have a heavier burden of showing that the interceptions were reasonable" (Pet. App. A49, n. 12).[10/]

The court's emphasis on the objective facts surrounding the actual interceptions in determining whether the minimization standards have been met is entirely consistent with the analysis of other courts of appeals that have considered this issue. See United States v. Daly, supra; United States v. Armocida, supra; United States v. Quintana, supra; United States v. Bynum, supra. Petitioners point to no decision of any court of appeals that concludes that there has been a failure to minimize because of the agents' intent to listen to all calls when such total interception was reasonable, and we are aware of none. Indeed, in at least six cases other than the present one, interception of all or nearly all calls was held

9/ Moreover, because the court of appeals directed issuing judges to require reports concerning efforts to minimize in orders issued hereafter (Pet. App. A52-A53), the issue is not likely to be a recurring one, at least in the District of Columbia Circuit. See note 11, infra.

10/ This focus on the objective reasonableness of what has occurred represents the better view in traditional search and seizure analysis: the Fourth Amendment's proscription against unreasonable searches and seizures is violated not by attitudes but by actions. See United States v. Robinson, 414 U.S. 218; Sinmarco v. United States, 315 F. 2d 669 (C.A. 10), certiorari denied, 374 U.S. 807; United States v. Welsh, 446 F. 2d 220 (C.A. 10); United States v. Lee, 308 F. 2d 715 (C.A. 4). But see Massachusetts v. Painter, 368 F. 2d 142 (C.A. 1), certiorari dismissed as improvidently granted, 389 U.S. 560; United States v. Cooks, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996. We submit

(continued)

not to have violated the minimization requirement. See United States v. Chavez, supra; United States v. Quintana, supra; United States v. Bynum, supra; United States v. James, supra; United States v. Manfredi, 488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936; United States v. Cox, 462 F. 2d 1293 (C.A. 8), certiorari denied, 417 U.S. 918.[11/]

2. Contrary to petitioner Daviage's claim (Pet. No. 76-6637, pp. 8-9, 12-14), the courts below correctly concluded (Pet. App. A24, A32, A8 n. 1) that the affidavit supporting the intercept application in this case presented the authorizing judge with a sufficient factual basis to warrant his conclusion that normal investigative techniques had been tried and had failed or were unlikely to succeed.

The affidavit (see note 2, supra) stated that the government had attempted physical surveillance, but that the conspirators had avoided detection in many instances by varying their pattern of activities and by careful selection of purchasers and sellers. The acquisition by the government of telephone toll records (which list long distance calls made at a particular number) did not provide law enforcement officials with information concerning the local aspects of the operation. Furthermore, although a reliable informant had infiltrated the conspiracy at the retail level, he was unable to provide information regarding the source of the drugs, the location of the "factory" where the drugs were prepared for distribution, and the identity of a reputed "silent partner" in the operation.

On the strength of these facts, the issuing judge "could have reasonably determined that the individuals being investigated were acting cautiously, were sensitive to the potential of a police

10/ (continued) that the purpose of the Amendment, and of the minimization requirement of Title III as well, is to curb unreasonable searches not to suppress improper desires. For that reason, reliance by the court of appeals on the government's call analysis was clearly proper, since it served to illuminate the objective reasonableness of the overhearings.

11/ Petitioners' fears that this case portends a weakening of the statutory requirements of minimization is refuted by the court of appeals' directive to the district court (Pet. App. A52-A53) that

> * * * in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize. This will guarantee that the uncertainties in this record are not duplicated in future cases and will further the intent of Congress.

(continued)

investigation and that the full scope of the criminal conspiracy, if it existed, could not be determined except by means of electronic surveillance." United States v. Fury, supra, 554 F. 2d at 529.

The court of appeals are generally in agreement that, "[i]n enacting Title III, Congress did not require the exhaustion of 'specific' or 'all possible' investigative techniques before wiretap orders could issue." United States v. Jackson, 549 F. 2d 517, 537 (C.A. 8). Accord, United States v. Fury, supra, 554 F. 2d at 530; United States v. Scibelli, 549 F. 2d 222, 226 (C.A. 1), certiorari denied, No. 76-1212, June 6, 1977; United States v. Spagnuolo, 549 F. 2d 705, 710 (C.A. 9); United States v. DeLa Fuente, 548 F. 2d 528, 537-538 (C.A. 5); United States v. Daly, supra, 535 F. 2d at 438.[12/] The purpose of the statutory requirement is "to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Here, the affidavit set forth in sufficient detail a description of the traditional techniques that had been employed in this case yet had failed to uncover the full scope of the conspiracy. The issuing judge therefore was sufficiently informed to be able properly to conclude that resort to wire interceptions was appropriate.

3. Petitioners contend (Pet. No. 76-6637, pp. 14-16; Pet. No. 76-6767, pp. 9-10) that the pre-trial delay of six years, occasioned in major part by the court of appeals' consideration of the government's two interlocutory appeals, deprived them of their constitutional right to a speedy trial. The court of appeals carefully considered and correctly rejected this claim (Pet. App. A8-A12).

11/ (continued)

12/ Petitioner's reliance on United States v. Kalustian, 529 F. 2d 585 (C.A. 9), is unavailaing. In United States v. Spagnuolo, supra, 549 F.2d at 710, the Ninth Circuit declared: "Kalustian teaches no more than that an affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with the statute." As the Sixth Circuit recently has said, "What is required * * * is information about particular facts of the case at hand * * *." United States v. Landmesser, 553 F.2d 17, 20. Such information was furnished in the present case.

Most of the delay in bringing petitions to trial was occasioned by the government's interlocutory appeals, which were expressly invited by the district court (Pet. App. A28-A29) and which involved the consideration by the court of appeals of complex and novel questions with respect to the recently enacted wire interception statute (Pet. App. A10-A11). No governmental misconduct can be attributed to this delay. See Harrison v. United States, 392 U.S. 219, 221-222, n. 4; United States v. Sarvis, 523 F.2d 1177, 1183 (C.A.D.C.); United States v. Bishton, 463 F.2d 887 (C.A.D.C.). "The right of the Government to appeal decisions in the defendant's favor before jeopardy attaches is designed to protect the interest of society in lawfully prosecuting criminal offenders * * *." United States v. Bishton, supra, 463 F.2d at 890. The delay in this case resulting from the operation of the appellate process was necessary to assure careful review of important legal questions, and petitioners cannot complain of the time it took to correct erroneous district court orders that petitioners in the first instance persuaded the district court to enter.

Moreover, as the court of appeals noted (Pet. App. A11-A12), during the pre-trial period petitioners were not incarcerated in connection with this case, asserted their speedy trial rights in less than vigorous fashion, and raised no substantial claim of prejudice as a result of the delay (Pet. App. A12). In these circumstances, petitioners' claim that the delay in this case abridged their right to a speedy trial is unpersuasive.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys.

AUGUST 1977.

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REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

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INTRODUCTION

The Government's opposition brief sets forth several arguments against issuing the writ of certiorari which, we believe, do not stand the test of comparison with the record.

ARGUMENTS

I. THE MERITS - MINIMIZATION

The Government contends the court of appeals' analysis of the minimization issue is "entirely consistent with the analysis of the other courts of appeals that have considered the issue." Opposition brief, p.8. That claimed consistency is hard to find. Moreover, it does not take extensive examination of the wiretap records or evidentiary hearing transcripts to demonstrate the point.

Recognizing, as we do, that even total interception can sometimes be reconciled with the minimization requirement, other circuits have articulated as the key to sustaining such wiretaps the efforts of the monitoring agents to avoid unnecessary interception. Judge Winter, for the Fourth Circuit, recently wrote that "the statute is deemed to be satisfied if on the whole the agents have shown a high regard for the right of privacy and have done all they reasonable could to avoid unnecessary intrusion." United States vs. Clerkley, 556 F.2nd 709 (4th Cir. 1977), quoting United States vs. Armocida, 515 F.2nd 29, 42 (3rd Cir.), cert. denied 423 U.S. 858 (1975), quoting, in turn, United States vs. Tortorello, 480 F.2nd 764, 784 (2nd Cir.), cert. denied 414 U.S. 866 (1973). See also United States vs. Quintana, 508 F.2nd 867, 874 (7th Cir. 1975). This case cannot be reconciled with that standard.

The supervising agent testified that, with one irrelevant exception[1], no effort was made to minimize interception. His testimony, excerpted in the petition in Appendix C, was the basis for Judge Waddy's finding, after the first remand, that, despite their admitted knowledge of the minimization requirement, "the monitoring agents made no attempt to comply with the minimization order. . ."

Portions of the court of appeals' opinion reversing the second suppression order pay lip service to the standard quoted above from Clerkley, but its path to decision proceeds on the objective theory that an after the fact analysis showed a substantial number of crime related calls and no apparent category of calls which could be easily identified as unrelated.

Even on a purely objective analysis, this case does not match up to those of other circuits. United States vs. Quintana, 508 F.2nd 867 (7th Cir. 1975), for example, suggests three criteria - the size of the criminal enterprise, the reasonable expectation of the content of the conversations and the extent of judicial supervision. This case fares very badly on the first and third criteria. On the second, Judge Waddy's first opinion (Appendix A) summarizes several categories of calls which could not have related to drugs. A fourth factor, mentioned in Clerkley, is the need to identify unknown participants in the conspiracy. 556 F.2nd at 717. The Government has not claimed any such justification in this case. Even if the court of appeals is correct in suggesting that objective criteria can sometimes validate a bad faith refusal to undertake minimization, its opinion in this case authorizes total incorporation on facts inconsistent with those articulated in other circuits.

1/ The wrong line had been tapped.

II. STANDING

Although conceding that Thurmon, whose non-crime related conversations were overheard, has standing to complain of the minimization violation, the Government argues that Scott does not[2]. In its first opinion, the court of appeals correctly rejected the claim. Judge McGowan's opinion for the court pointed out that 18 U.S.C. §2510(11) defines an "aggrieved person" as any person "who was a party to any intercepted wire. . .communication." Section 2518, in turn, gives any "aggrieved person" the right to "move to suppress the contents of any intercepted wire. . .communication. . .on the grounds that. . .(iii) the interception was not made in conformity with the order of authorization. . ." Scott falls within the statutory definition.

Judge McGowan's reading of the statute is consistent with the case law in the District of Columbia Circuit, see, e.g., United States vs. Bellosi, 163 U.S. App. D.C. 273, 501 F.2nd 833 (1974) and in other circuits. See, e.g., United States vs. Giordano, 469 F.2nd 522 (4th Cir. 1972), affirmed 94 S. Ct. 1820 (1974). Although the non-literal reading of the statute proposed by the Government has been adopted elsewhere, see, e.g., United States vs. King, 474 F.2nd 494 (9th Cir. 1973), cert denied sub nom Light vs. United States, 414 U.S. 846 (1974), that conflict is hardly reason to refuse review here. If the Government is serious about its reading of the statute, it should be urging the Court to consider it as one of the questions presented.

2/ This brief is filed on behalf of Scott and Thurmon. It does not argue for Daviage, who is separately represented.

CONCLUSION

The writ should be granted for all petitioners.

Respectfully Submitted,

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

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BRIEF OF PETITIONERS

SAMUEL DASH
MICHAEL E. GELTNER
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

JOHN A. SHORTER, Esq.
508 5th Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

Attorneys for Petitioners

Of Counsel:
Christopher M. McMurray
Kenneth D. Polin

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF OF PETITIONERS

INTRODUCTORY STATEMENT

The Court, on October 11, 1977, granted a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that court affirming petitioners' convictions and its two interlocutory decisions reversing district court orders

suppressing wiretap evidence for failure to minimize interception of non crime-related conversations in violation of 18 U.S.C. §2518(5).

The first suppression opinion is at 331 F. Supp. 233 (D.D.C. 1971), and the Court of Appeals' first remand opinion ("Scott I") is at 164 U.S. App. D.C. 125, 504 F.2nd 194 (1974). The second suppression order is not reported, and the Court of Appeals' second reversal opinion ("Scott II") is at 170 U.S. App. D.C. 158, 516 F.2nd 751 (1975). The Court of Appeals' third opinion, affirming the convictions, is not reported.

This Court has jurisdiction to review the judgment below by writ of certiorari under 28 U.S.C. §1254(1). The judgment was entered March 29, 1977, and, upon application, the time for petitioning for a writ of certiorari was extended to May 28, 1977. The petition was filed May 19, 1977.

STATUTES INVOLVED

18 U.S.C. §2510

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. §2518

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but

only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

QUESTIONS PRESENTED

I. When narcotics agents executing judicial wiretap orders requiring them, under 18 U.S.C. §2518(5), to minimize the interception of non crime-related conversations admittedly made no good faith try at minimization and instead intercepted every conversation in whole despite their own conclusion that sixty (60) per cent of the conversations were non crime-related, may a court, consistent with the deterrent basis of Title III of the Safe Streets Act of 1968 and the exclusionary rule, sustain the execution of the wiretaps by accepting the after the fact analysis of the wiretap transcripts prepared by an Assistant United States Attorney which abandoned the categories used by the executing narcotics agents and justified interception of telephone calls on the ground that agents could have found it not feasible to exclude those calls from interception.

II. Whether 18 U.S.C. §2518(10)(a) and the Fourth Amendment exclusionary rule require suppression of all intercepted conversations when narcotics agents executing wiretap orders violate the minimization order

required by 18 U.S.C. §2518(5) by failing, in bad faith, to even attempt minimization of non crime-related conversations.

III. Whether Petitioner Scott, an "aggrieved person" under 18 U.S.C. §2510(11), who was not heard in any non crime-related conversations, has "standing" to insist on suppression of all conversations intercepted by a wiretap operation violating the minimization provisions of 18 U.S.C. §2518(5) on the ground that "the communication was unlawfully intercepted" and "the interception was not made in confirmity with the order of authorization . . ." as provided in 18 U.S.C. §2518(10)(a)(i) and (iii).

PROCEDURAL HISTORY OF THE CASE

On January 24, 1970, District Judge Smith authorized narcotics agents to wiretap a telephone in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2518 (1970). The authorization contained an order to conduct the intercept "in such a way as to minimize the interception of communications that are not otherwise subject to interception." (App. 80).[1] Wiretap information led to the arrest of Petitioners Frank Ricardo Scott, ("Scott"), Bernis Lee Thurmon, ("Thurmon") and others for narcotics laws violations on February 24, 1970. Two multi-count indictments filed on June 24, 1970[2] charged, Scott, Thurmon and others with narcotics laws violations.

[1] References to the Joint Appendix will be made as (App. ____).

[2] The two indictments were consolidated in 1971.

Scott, Thurmon and others moved to suppress the wiretap evidence on numerous grounds, and hearings were held between April 12 and April 21, 1971. On April 29, 1971, District Judge Waddy suppressed all wiretap evidence for failure to minimize interception of non crime-related calls in violation of 18 U.S.C. §2518(5). 331 F. Supp. 223 (D.D.C. 1971) (App. 1). The Government moved on May 26, 1971 for reconsideration of the suppression order on the basis of a newly prepared "call analysis," but on June 25, 1971 Judge Waddy adhered to his order.

The Court of Appeals vacated Judge Waddy's suppression order on June 27, 1974, and remanded with instructions to consider additional evidence and the "call analysis" in light of the minimization standards for testing it announced in *United States v. James*, 161 U.S. App. D.C. 88, 494 F.2d 1007, cert. denied 419 U.S. 1020 (1974). 164 U.S. App. D.C. 125, 504 F.2d 194 (D.C. Cir. 1974) ("Scott I") (App. [redacted]). On remand, Judge Waddy held hearings from October 15 to October 18, 1974 and filed unpublished findings of fact and conclusions of law on November 12, 1974 again suppressing the wiretap evidence (App. [redacted]). On July 25, 1975, the Court of Appeals again reversed the suppression order and remanded for trial. 170 U.S. App. D.C. 158, 516 F.2d 751 (1975) ("Scott II") (App. [redacted]). The Court of Appeals denied rehearing *en banc*. (App. [redacted]). This Court denied certiorari to review the *Scott II* decision, 425 U.S. 917 (1976), with Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Powell dissenting. (App. [redacted]).

After the denial, the case returned to the district court and went to trial after speedy trial motions were

denied. Following a non-jury trial on stipulated facts, Judge Waddy found Scott guilty of the sale or purchase of narcotics not in the original stamped package in violation of 26 U.S.C. 4704(a) and Thurmon guilty of conspiracy to sell narcotics in violation of 26 U.S.C. 7237(b) and 4705(a),[3] sentencing both to ten years imprisonment. The Court of Appeals opinion of March 29, 1977 affirming the convictions is unreported. This Court granted certiorari on October 11, 1977.

STATEMENT OF THE CASE

A. Wiretap Procedure

1. Applications

On the basis of information obtained from informants and prior investigation, the Government applied on January 24, 1970 to District Judge Smith for an order to wiretap telephone number 4[redacted]-2948, registered to Geneva Thornton[4] and located in a residence at 1425 N Street, #603, Northwest, Washington, D.C. The Government alleged probable cause to believe that Thurmon, Alphonso H. Lee ("Lee"), and others were committing narcotics offenses and using telephone number 483-2948 in connection with such

[3] The statutes under which Petitioners were convicted were repealed in connection with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292, 21 U.S.C. §840 (1970).

[4] Also known as Geneva Jenkins, girlfriend of Thurmon, who lived at the same address.

offenses. The affidavit of special agent Glennon L. Cooper ("Cooper"), in support of the wiretap application listed the primary suspects of the investigation, including Scott and Thurmon. (App. [redacted]) Cooper claimed the wiretap would reveal "the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D.C. area and distribute them in [that] area." (App. [redacted]) Although Cooper claimed Thurmon was a local drug trafficker (App. [redacted]), the initial twenty day wiretap was sought on his telephone (registered to Geneva Thornton) because Lee, claimed to bring drugs into the Washington area, was hospitalized and had temporarily shifted his business calls to the 483-2948 number. (App. [redacted]).

2. Orders

Based on Cooper's affidavit and the supporting affidavit of Assistant United States Attorney Sullivan ("Sullivan"), on January 24, 1970 Judge Smith authorized a wiretap of the Thurmon telephone for twenty days,[5] with the provision required by 18 U.S.C. §2518(5) (1970), that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." (App. [redacted]). He required progress reports every five days. (Ibid.)

[5] Application was made for 20 days. A typographical error resulted in the authorization of a 30-day intercept, but the Government applied for an extension after 20 days.

After Lee was released from the hospital, the Government applied to Judge Smith February 4, 1970 for permission to tap Lee's two telephones at 5195 Linnean Terrace, Northwest, Washington, D.C. (App. 84) On February 4, 1970, Judge Smith authorized wiretap of the two Lee telephones, again requiring minimization of the interception of non crime-related conversations and five day progress reports.

On February 13, 1970 the Thurmon wiretap was extended. (App. [redacted])

3. Reports

The Government submitted five day reports designed to detail the nature of the communications intercepted, demonstrate what progress had been made toward achievement of the authorized objective and the need for continued interception. For the most part, the reports simply reveal the number of calls intercepted during delineated time spans and state which of those calls were considered narcotics related.[6] The reports did not, however, reveal the monitoring agents' assessment that 60% of the calls were not narcotics related, that all calls were listened to, and that no efforts were made to

[6] A few reports summarize segments of taped conversations revealing interstate connections and other matters pertinent to identification and verification of the various conspirators. E.g., February 8 report, February 13 report. The incompleteness and inaccuries of the reports and their effect on the minimization issue before the district court will be discussed in the argument, *infra*.

exclude or develop categories to exclude non-pertinent calls.

The Thurmon and Lee wiretaps continued until February 24, 1970, when Thurmon and Scott were arrested.

B. Proceedings After Indictment

1. Pre-Trial Motions To Suppress

Judge Waddy held hearings in April, 1971 ("the 1971 hearings") on several pre-trial motions, including one to suppress all wiretap evidence on the ground that the monitoring agents failed to minimize the wiretap intrusions. On April 29, 1971, he granted the motion to suppress for lack of minimization, stating that the agents in charge of the interceptions "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate, but rather completely disregarded it." (App. 21) Judge Waddy found that the monitoring agents clearly understood the wiretap orders' requirement of minimization. (App. 20) Judge Waddy based his findings upon the testimony of Cooper, the agent in charge of the Thurmon wiretap operation, who was the sole witness on the minimization issue at the April hearings. Cooper testified that he understood Judge Smith's order "to restrict [the intercept] to conversations relating to narcotics" and so instructed the agents manning the intercept.[7]

[7]Cooper stated that the agents were specifically instructed to monitor "all calls except for those which [fall] into a privileged nature, certain restricted types of calls," (1971 Tr. 308).

Judge Waddy found that virtually all conversations were recorded and approximately 60% were completely unrelated to narcotics. Ibid. Moreover, he examined specific instances where the intercept should have been cut off, citing calls between Geneva Jenkins and her mother as one example.[8] Judge Waddy's findings relied on Cooper's admission that, although none of the cited conversations appeared narcotics related, there was no attempt to cut off interception. (1971 tr. 350-53). Judge Waddy rejected the Government's reliance on the reports to Judge Smith, finding that they did not reveal the agents were failing to minimize and, in fact, were listening to and recording in full all conversations. (App. 22). Finally, Judge Waddy noted that "[t]he record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls." (App. 23) Judge Waddy relied particularly on Cooper's testimony that no exercise of discretion by any monitoring agent ever resulted in non-recordation.[9]

[8]Judge Waddy cited other calls, such as a Thurmon call to the bank and a call to the weather bureau, as among those where the intercept clearly should have been cut off. (App. 24).

[9]Cooper stated that "it was up to the agent to listen to the conversation and determine what type of conversation it was," (1971 Tr. 318), and that he "made phone calls to Mr. Sullivan relating to pertinent information which had been revealed as a result of the intercept." (1971 Tr. 30). He further testified that no call was ever made to Sullivan to limit the discretion of any agent during the surveillance. (1971 Tr. 321). The tap was cut off on one occasion but only because a malfunction had caused the intercept to be placed on the wrong telephone line. (1971 Tr. 321; 1974 Tr. 681).

2. Motion For Reconsideration

On May 25, 1971 the Government moved for reconsideration on a legal memorandum prepared by Assistant United States Attorney Kellogg ("Kellogg") which contended that "the peculiar characteristics" of the conspiracy required that "nearly all calls" be recorded. (Gov't motion at 2). The Government offered a "call analysis" to refute the assumption that the calls were 40% narcotics related and 60% non-narcotics related and to demonstrate that all calls could reasonably have been intercepted and contended that only a very small percentage of the intercepted calls properly should have been cut off. Finally, the Government contended for the first time persons who had no innocent conversations intercepted lacked standing to demand suppression. Judge Waddy denied the Government's motion for reconsideration on all grounds. (App. [redacted] 25-27).

3. First Government Appeal – Scott I

After oral argument of the first interlocutory appeal the court of appeals delayed decision in *Scott I* until it decided similar minimization issues in its then-pending case of *United States v. James*, 161 U.S. App. D.C. 88, 494 F.2d 1007, cert. denied 419 U.S. 1020 (1974).

On June 27, 1974, after James was decided, the Court of Appeals released its *Scott I* opinion, affirming Judge Waddy on the standing issue. 504 F.2d 194, 197, but concluding, on the minimization issue, that Judge Waddy had not applied the *James*, standard. The Court

remanded *Scott I* to Judge Waddy for hearing under the newly promulgated *James* standard that minimization was satisfied if the agents made good faith efforts to minimize and if those efforts were reasonable.[10] 504 F.2d at 198; see *United States v. Tortorello*, 480 F.2d 764, 784 (2nd Cir.) cert. denied, 414 U.S. 866 (1973). The Court instructed Judge Waddy to accept evidence that would aid in assessing the reasonableness of the agents' conduct, including, if he was convinced of its validity the "call analysis."

4. The 1974 Remand Hearings

On remand, Judge Waddy held four days of hearings from October 15-18, 1974 ("the 1974 hearings"), concerning almost exclusively, the minimization issue. Cooper and Kellogg were the only two witnesses called. On November 12, 1974, Judge Waddy issued findings of fact, conclusions of law and an order (App. [redacted] 33), again suppressing all of the calls intercepted.

Judge Waddy found that while Cooper and the other agents knew that the statute and Judge Smith's orders required minimization, they made no attempt to comply, (App. [redacted] 37) and showed no regard for privacy and did nothing to prevent unnecessary intrusion. Ibid.

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[10]The Court directed that the District Court assess the reasonableness of the agents efforts in light of the purpose of the wiretap and the information available to them at the time of the interceptions. 504 F.2d at 198. The Court emphasized that "[t]he reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis . . ." than that utilized by the District Court. Ibid.

> "An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization. (App. [redacted])

At the hearing, Cooper had again testified that while he and the other agents knew that Judge Smith had ordered them to minimize, they took no steps to do so.[11] The instructions under which the agents operated were to intercept and record every call, except for certain classes of privileged communications. (lawyer-client, doctor-patient and priest-penitent[12]). Since no

[11]1974 Tr. 97-98, 324-35. After Kellogg's testimony, Judge Waddy recalled Agent Cooper to answer one question. BY THE COURT: The question I wish to ask you is this, whether at any time during the course of the wiretap – of the intercept, what if any steps were taken by you or any agent under you to minimize the listening? ANSWER: Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the interception of conversations was in that instance where the line was connected to – misconnected from the correct line and connected to an improper line. We discontinued at that time. QUESTION: Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number? ANSWER: This is correct, Your Honor.

[12]1974 Tr. 90-97, 190. QUESTION: So what I am saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics – related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir? ANSWER: Basically that is correct, sir. Tr. 95.

privileged communications were encountered, Agent Cooper admitted intercepting all 384 calls made or received during the period of the tap. Tr. 79, 94-97.

Judge Waddy found that the conclusion that 60% of the intercepted calls were not narcotics related stemmed from the classifications of the monitoring agents,[13] who reported to Judge Smith but did not inform him there was no attempt to minimize. (App. [redacted]).

Following the court of appeals' direction, Judge Waddy admitted the call analysis into evidence. He found that Kellogg made the call analysis as an advocate, that it was not shown to contain realistic categories for agents to use in manning a wiretap, (App. [redacted]) and in fact conflicted with the reports and characteristics of the agents. (App. [redacted]) He then concluded that the call analysis was after the fact and did not show that the agents complied with the minimization order. (App. [redacted])

At the hearings, Kellogg admitted that the call analysis was purely after the fact, (1974 Tr. 423-424) without the aid of experts such as narcotics agents (1974 Tr. 354, 435-36) and was not meant to suggest that the agents had actually followed such guidelines, and that, in fact, a seven-value system such as his was impractical for use by field agents.[14] Examination

[13]This finding was based on Cooper's testimony to that affect. 1974 Tr. 308-309 (App. [redacted]).

[14]1974 Tr. 458-67, 471. KELLOGG: . . . The thrust of the call analysis is purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to infer, or assert, that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no[t], insofar as I understand. 1974 Tr. 436.

indicated discrepancies betwe[illegible]e call analysis and the reports given to Judge Smith. 1974 Tr. 265-288.

Judge Waddy concluded that the failure to comply with the minimization order was unreasonable and that 18 U.S.C. §2518(10)(a)(iii) mandated suppression of all the calls intercepted. (App. [illegible])

> "The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of the search is not to be determined by what is found." Ibid.

5. The Second Government Appeal – Scott II

The Government's appeal from the second suppression order resulted in another reversal. (App. [illegible]) The Court's opinion, written by Judge MacKinnon, rejected Judge Waddy's primary concern with the perception and failures of the monitoring agents. (App. [illegible]) In substance, the Court uncritically adopted the call analysis, rejecting examination of agents' use of discretion as an impractical means of minimization during the course of a wiretap even though it conceded there was no effort to minimize. (App. [illegible])

> "To hold that the monitoring agents must make a determination whether to minimize in the course of each individual conversation would be an open invitation to criminals to escape detection by the simple device of devoting the initial part of each call to non-criminal matters. Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap

> order, of categories of calls which most likely will not produce information relevant to the investigation. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization." (App. [illegible])

The Court conceded that no attempt at all was made to minimize, but rejected bad faith as a significant criterion, stating that:

> The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order and yet it is possible that the ultimate interception will be found to have been reasonable." (App. [illegible])

The Court then uncritically adopted the Government's call analysis, and, comparing the *James* standards, concluded that the total interception was not unreasonable. (App. [illegible])

Although the Court found that the agents had acted reasonably, it went on to say that if a remedy had been necessary it would have merely called for suppression of the non-pertinent calls, and that the narcotics-related calls could remain in evidence. (App. [illegible], n.19)

A request for an *en banc* rehearing was denied with four judges dissenting. (App. [illegible]) This Court's denial of certiorari at the interlocutory stage was accompanied by Mr. Justice Brennan's dissenting opinion examining the minimization issue. (App. [illegible])

6. Trial

Scott, Thurmon and other defendants went to trial on July 15, 1976, and were found guilty of narcotics violations. The stipulation on which the guilt determination was based derived from the wiretap evidence.

SUMMARY OF ARGUMENTS

The minimization requirement of 18 U.S.C. §2518(5) is at the heart of the protections imposed in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, aimed both at protecting individual privacy and satisfying this Court's expressed distaste for general searches. The Court of Appeals erred by concluding minimization could be satisfied by an after the fact rationalization of how others might have read the wiretap transcripts. Rather, Congress' choice of the exclusionary rule to deter invasions of privacy requires analysis of whether monitoring agents acted in good faith and made an attempt at excluding non-pertinent conversations which was reasonable based on the facts they perceived. Here, the district judge found to the contrary; there was no good faith attempt to minimize and, instead, total interception, and, since the agents themselves categorized 60% of the intercepted calls as non crime-related, reasonable minimization efforts would require them to act on the basis of their own perceptions. Even accepting the after the fact "call analysis", it did not justify total interception when examined on the criteria used in the courts of appeals to test out good faith efforts to minimize.

Suppression of both crime related and non-crime related calls is the explicit statutory remedy for failure to minimize, a remedy particularly appropriate where, as here, the failure to minimize resulted, in effect, in a general search. For the same reason, the explicit statutory grant of standing to all victims of unlawfully executed wiretaps should not be rewritten by the court to cover only those whose innocent conversations were overheard. The suppression remedy protects both those victimized by an unlawful search producing tangible results and those searched without production of such results.

ARGUMENTS

I.

A REVIEWING COURT MAY NOT FIND COMPLIANCE WITH MINIMIZATION REQUIREMENTS BY ACCEPTING AN AFTER THE FACT ANALYSIS AIMED AT DEMONSTRATING THAT NARCOTICS AGENTS COULD HAVE CONSIDERED MOST CALLS CRIME RELATED, WHEN THE MONITORING AGENTS ACTUALLY CONSIDERED MOST CALLS TO BE NON-CRIME RELATED AND NEVERTHELESS MADE NO EFFORT TO MINIMIZE INTERCEPTION OF THOSE CALLS.

A. The Error In The Court Of Appeals' Analysis

The Scott II court saw "objective reasonableness" after-the-fact as the decisive factor in testing agents' compliance with minimization requirements; whether

the agents subjectively intended to minimize their interceptions, the bad faith of the monitoring agents in not instituting any minimization procedures and the agents' assessment of which calls were crime related were thus deemed essentially irrelevant.

The explicit terms of Section 2518(5) mandate that monitoring agents take affirmative steps to minimize intrusions in executing valid wiretap interceptions. Section 2518(5), in turn, was made a part of the 1968 act because of congressional concern that authorized electronic surveillance not be conducted in a manner that violates the constitutional guidelines announced in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). S. Rep. No. 1097, 90th Cong. 2d sess., 102 (1968); [1968] U.S. Code, Cong., & Ad. News, pp. 2112, 2153, 2163.

In *Berger*, this Court condemned New York's wiretap statute because it gave wiretapping police a "roving commission to seize any and all conversations." 388 U.S. at 59. The distaste for the wiretap's "general search" expressed in the majority opinion and its recognition of the unique pervasiveness of an eavesdrop search, led at least one member of the Court to suggest that the Court had, by indirection, made constitutional wiretaps impossible. 388 U.S. at 113 (Mr. Justice White dissenting). Mr. Justice Stewart's opinion in *Katz* settled some of those fears, but it, too, emphasized the need for careful procedures to prevent overreaching wiretap searches, pointing to the close supervision in *Osborne v. United States*, 385 U.S. 323 (1966). It was to the Court's expressed distaste for general searches by wiretap that the Congress responded with §2518(5), in an effort to avoid unwarranted police invasions of

privacy by forcing wiretapping police themselves to take steps to protect privacy. *United States v. Focarile*, 340 F. Supp. 1033, (D. Md.), aff'd *sub nom United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd 416 U.S. 505 (1974). The legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 demonstrates its goal of preventing unwarranted invasions of privacy by regulating police conduct,[15] by establishing companion safe guards that law enforcement officials must follow in executing a lawful wiretap. E.g., §§2518(3)(a), (b), (c) and (d). These provisions were designed to assure that

> the order will link up [a] specific persons, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.

S. Rep. No. 1097, 90th Cong., 2d sess., 102 (1968); see *Bynum v. United States*, 423 U.S. 952, 952 (1975) (Mr. Justice Brennan dissenting from denial of certiorari).

Although Congress focussed, especially in the minimization requirement, on the conduct of monitoring

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[15]Title III pronounces dual purposes: (1) protecting the privacy of wire–communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire . . . communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d sess., 66 (1968); see Note, Minimization of Wire Interception: Pre-Search Guidelines and Post-Search Remedies, 26 Stan. L. Rev. 1411, 1413-14 and n.17 (1974).

agents, the court of appeals in this case ignored that focus for after the fact analysis of the contents of the wiretap transcripts. Congressional belief that minimization should be tested during the course of the wiretap, however, and not validated by the ultimate results is evident in its recognition that the judiciary must supervise the interception of wire communications in order that the privacy of innocent persons is protected. See 18 U.S.C. §2518(6) (1970); [1968] U.S. Code, Cong. and Ad. News, pp. 2112, 2177, 2192-93. This continuing check on the progress and continued need for the surveillance emphasizes the paramount Congressional concern that Title III wiretaps be administered in good faith so as to stay within the constitutional standards promulgated by this Court in *Berger* and *Katz*.

Congress consciously chose the exclusionary rule in section 2515 to enforce the limitations Congress imposed on wiretapping. *Gelbard v. United States*, 408 U.S. 41, 48-49 (1972).[16] This Court has repeatedly said that the "prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). See also *Stone v. Powell*, 428 U.S. 465, 485-86 and n.23 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Peltier*, 422 U.S. 531, 536-49 (1975), *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 413 (Chief Justice Burger, dissenting); See *Berger v. New York*, 388 U.S. 41, 50-51 (1967).

Any rule primarily concerned with police deterrence must make its results turn on the intention of the

[16]S. Rep. No. 1097, 90th Cong., 2d sess., 96 (1968).

police at the time they acted and the reasonableness of their perceptions and actions in light of the facts known to them; the model rewards reasonable good faith efforts and punishes those which are in bad faith or are unreasonable. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 446-447 (1974); *United States v. Peltier*, 422 U.S. at 537-38, 542 (1975). This need to examine the conduct of the police in light of their intention and the facts known to them applies with equal force under Title III. Under Fourth Amendment deterrent rationale and Title III, after-the-fact analysis of the results of police conduct is irrelevant if the officers failed in bad faith in execution of their responsibilities[17] or acted unreasonably.

Circuit Judge Robinson, in explaining his vote to review Scott II *en banc*, noted that "[I]f objective reasonableness is the standard [for evaluation of minimization compliance] there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps. This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified." (App. [redacted]) All of the circuits passing on the question have likewise concluded that, in minimization cases, results turned on the good faith or bad faith of monitoring agents at the time of the wiretap and the reasonableness of their conduct in light of the facts known to them; courts have refused to

[17]Of course, an illegal search or seizure may not be validated by what is found. See *United States v. Johnson*, 333 U.S. 10 (1948); *United States v. DiRe*, 332 U.S. 581 (1948).

suppress for failure to minimize even in total interceptions and despite being shown categories of non crime-related conversations which, in hindsight might have been cut-off.[18] The same analysis, of course, mandates suppression where, as here, there was both bad faith failure to attempt minimization and a perception that a substantial majority of the intercepted conversations were non crime-related.[19]

Judge Waddy specifically found that the "call analysis" did not reflect the understanding of the monitoring agents at the time of interception and did not analyze the intercepted calls as they did. (App. [redacted]) His finding rested on questioning of Cooper, the

[18]In *United States v. Chavez*, 533 F.2d 491 (9th Cir. 1976), for example, the ninth circuit rejected the use of hindsight analysis to demonstrate particular calls that were not conspiracy-related. Id. at 494 (that is not the proper test). See *United States v. Armocida*, 515 F.2d 29, 45 (3rd Cir.) (not determinative that hindsight reveals a number of calls that could have been terminated at an earlier time where agents exercised their discretion in good faith) cert. denied 423 U.S. 858 (1975); *United States v. Vento*, 533 F.2d 838, 853 (3rd Cir. 1976), (minimization is not to be judged by a rigid hindsight, but must consider the problems confronting the officers at the time of the investigation); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) cert. denied 417 U.S. 918 (1974). (No failure to minimize even though in retrospect it is clear that a substantial portion of calls had no evidentiary value).

[19]Mr. Justice Brennan argued for an earlier grant of certiorari to review Scott II both because of the opinion's derogation of the importance of the monitoring agents' good faith attempt to comply and its retroactive validation of a Fourth Amendment search on the basis of what was uncovered by the search. 425 U.S. 917, 924 (1975).

agent in charge, who testified that the call analysis categories were not indicative of the agents' thinking and information, (1974 Tr. 332-334) and of Kellogg, the call analysis author, who testified that it was not "an effort to infer or assert that the agents followed these relatively sophisticated delineations in the course of the intercept." (1974 Tr. 436). In fact, they both testified that the call analysis disagreed with the characterizations of the agents, (1974 Tr. 143-44, 375) who, at the time of the intercepts, found 60 percent of the calls not narcotics related (1974 Tr. 308-11, 374-76) (App. [redacted]).[20]

When these findings are put together with Judge Waddy's findings that the monitoring agents "made no attempt to comply with the minimization order" and "did nothing to avoid unnecessary intrusion" (App. [redacted]),[21] it is apparent he had no choice but to find failure to minimize.

Judge Waddy's findings preclude use of the "call analysis" unless the Court completely rejects the mode of analysis of minimization discussed above.

The Scott II opinion's wholesale acceptance of this retrospective statistical analysis could not support its result for several other reasons. First, the district court found that the call analysis contained errors of

[20]Although the overall 40% - 60% breakdown of intercepted calls is reflected numerically in individual reports to Judge Smith (e.g., report of Jan. 20, 1970, App. 81, reporting number of calls and categorizing by number), he was never given an overall percentile breakdown.

[21]All of the findings are thoroughly supported by the record. See pp. [redacted], supra.

characterization and factual inaccuracies and did not represent information known to the agents at the time of interception.

Even if completely accepted, the call analysis does not place this wiretap on the acceptable side of the line when compared to the law in other circuits. The courts of appeals have proceeded on a case-by-case basis, evolving a general standard of reasonableness. See e.g., *United States v. Daly*, 535 F.2d 434, 441 (8th Cir. 1976); *United States v. Clerkley*, 556 F.2d 709, 716 (4th Cir. 1977); *United States v. Armocida*, 515 F.2d 29, 42 (3rd Cir.) cert. denied, 423 U.S. 858 (1975); *United States v. Cox*, 462 F.2d 1293, 1300; *United States v. Quintana*, 508 F.2d 867, 873-74 (7th Cir. 1975); *United States v. James*, supra, 494 F.2d 1007, 1018; see also [1968] U.S. Code Cong. Ad. News, pp. 2112, 2192. They are in substantial agreement that the statute is deemed to be satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Tortorello*, 480 F.2d 764, 784 (2nd Cir.) cert. denied, 414 U.S. 866 (1973), quoted approvingly in *Clerkley*, supra, 556 F.2d at 716; *Armocida*, supra, 515 F.2d at 42; *James*, supra, 494 F.2d at 1018 and *Quintana*, supra, 508 F.2d at 873.

They have tested the reasonableness of agents' conduct against at least three principle factors: (1) the nature and scope of the criminal enterprise under investigation; (2) the Government's reasonable expectation as to the contents of, and parties to, the conversations; and (3) the degree of judicial supervision by the authorizing judge. *Clerkley*, supra, 556 F.2d

709, 716; *James*, supra, 494 F.2d 1007, 1019; *Quintana*, supra, 508 F.2d 867, 874-75. The location and operation of the tapped telephone is also relevant. *James*, supra, 494 F.2d 1007, 1020. Cf. *Bynum*, supra, 485 F.2d 390, 501 (since defendant knew of tap he had no expectation of privacy). All these factors apply to the actions and knowledge of the monitoring agents in relation to the particular conspiracy being investigated at the time of the actual wiretap surveillance.

In Scott I the court of appeals directed Judge Waddy to examine minimization in light of the foregoing factors. Even based solely on those pertinent factors, he found a violation. Although the court of appeals in Scott II reached a contrary conclusion, it had no right to overturn Judge Waddy's findings without concluding they were clearly erroneous. Rule 52, Fed. R. Civ. P.

1. Scope of the Criminal Enterprise Under Investigation.

Judge Waddy correctly found that the conspiracy under investigation was of lesser dimension than originally anticipated. (App. [redacted]). The Government originally believed and said in its wiretap application the wiretap would uncover a major interstate and international narcotics operation. (App. [redacted], see also App. [redacted]). These views changed when the intercepts revealed only local purchases within the Washington, D.C. area. (App. [redacted]).

2. Reasonable Expectations Regarding Conversations.

More extensive monitoring is permitted where guarded or coded language is used to change highly relevant conversations into seemingly innocent ones. Judge Waddy found that according to the reports and classifications of the monitoring agents their perception was that 60% of the intercepted calls were not narcotic related. (App. [redacted]). The only references to coded language in the monitoring agents' reports revealed an ability to understand such language, (Feb. 3, 1970 Report (noting that "female" is a code word for cocain); Feb. 8, 1970 Report (noting that a "thing which would take ten" is slang for dilution of narcotics)).

3. Location and Operation of the Subject Telephone.

Judge Waddy found that the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of 'business' phone held less entitled to protection in *James*, supra. (App. [redacted])

4. Judicial Supervision by the Authorizing Judge.

Judge Waddy correctly found that the judicial supervision was inadequate to justify total interception because "Judge Smith was never informed that agents were making no attempt to minimize." (App. [redacted])

The legislative history of Title III directs that reports should be utilized specifically to show "progress toward

achievement of the authorized objective and need for continued interception." [1968] U.S. Code and Ad. News, pp. 2112, 2192-93. Thus the authorizing judge should be informed of all matters pertinent to the tap. Here, the reports failed to inform Judge Smith that no attempts to minimize were being made and that the conspiracy was of smaller dimensions than originally anticipated. As a result, he was denied the information necessary to check on whether the agents were minimizing. Judicial supervision, of course, suggests not only that the authorizing judge receive accurate reports, but also that he inquire into minimization efforts. In this case, the record reflects no such inquiry by the authorizing judge despite the reports' information that most of the intercepted calls were not crime-related.

II.

THE AGENTS' BAD FAITH FAILURE TO COMPLY WITH THE MINIMIZATION ORDER REQUIRES THE SUPPRESSION OF ALL INTERCEPTED CONVERSATIONS.

Judge Waddy recognized that the agents did not comply with Judge Smith's order to minimize and properly concluded after both suppression hearings that 18 U.S.C. §2518(10)(a)(iii) required suppression of all of the evidence obtained from the intercepts. (App. [redacted])

> "While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the statutes and order of

> the court. Failure to comply with the statute and order of the court renders any evidence obtained by such failure suppressible. *Sabbath v. United States*, 391 U.S. 585." (App. [redacted])[37]

The Court of Appeals, in Scott II, finding the agents' minimization efforts reasonable, decided that it need not reach the remedy issue. But it made clear in a footnote that it disagreed with Judge Waddy and that "suppression should be limited to the evidence seized which was beyond the scope of the wiretap authorization." (App. [redacted][52], n.19)

18 U.S.C. §§2515 and 2518(10)(a) permit any aggrieved person to move for suppression of wiretap evidence on the grounds that:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval . . . is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

An aggrieved person includes anyone whose conversation was intercepted or against whom the tap was directed. 18 U.S.C. §2510(11). We noted earlier Congress' policy judgment in §2515 to make suppression the necessary remedy to protect an individual's privacy and to deter unlawful interceptions. Unlike the case in *United States v. Donovan*, 97 S.Ct. 658 (1977), the minimization requirement of §2518(5), for the reasons noted earlier in this brief, is at the core of the protections Congress imposed to protect privacy and to satisfy this Court's constitutional concern.

Because the agents failed to comply with the minimization order, §2518(10)(a)(i) and (iii) are clearly applicable. Judge Smith's wiretap order specifically stated that the wiretaps must be conducted in such a way as to minimize interception of calls not relating to the purpose of the wiretap. (App. [redacted][55], [redacted][57]) Yet Agent Cooper testified that, despite the fact that he and the other agents knew of the minimization requirement, (App. [redacted][732-733]), his instructions were to intercept and record all conversations, except "privileged" ones. (App. [redacted][769-773]) There was no attempt made to determine whether certain calls were not pertinent so that non-pertinent intercepts would be terminated. (App. [redacted][749]) Not only were Judge Smith's orders violated, but they were violated in bad faith. §2518(10)(a)(iii) requires suppression of all calls so intercepted even without the finding of no good faith efforts made here.

The Court of Appeals' suggestion that only non-pertinent calls should be suppressed derogates from the congressional goals discussed earlier and the Fourth Amendment exclusionary rule. Suppression of only non-pertinent calls could have little, if any, deterrent value. *United States v. Focarile*, supra, at 1046. The Government would have nothing to lose and everything to gain in condoning general searches of this nature. Ibid.

At the time of the 1971, hearings, Judge Waddy had little case precedent to assist him in deciding the present issue. Yet several courts have recognized the wisdom of his reasoning and called for total suppression where there has been a complete failure to minimize. *United States v. Scully*, 546 F.2d 255 (9th Cir. 1976); *United States v. Turner*, 528 F.2d 143 (9th Cir. 1975);

United States v. George, 465 F.2d 772 (6th Cir. 1972); *United States v. Focarile*, supra; *United States v. Leta*, 332 F. Supp. 1357 (D.C. Pa. 1971), rev'd on other grounds 467 F.2d 647 (3rd Cir. 1972).

Despite the obvious inadequacy of a partial suppression remedy, several courts have suggested only non-pertinent calls need be suppressed. *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972); cert. denied, 417 U.S. 918 (1974); *United States v. Sisca*, 361 F. Supp. 735 (S.D.N.Y. 1973), aff'd 503 F.2d 1337 (2nd Cir. 1974); *United States v. LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971) rev'd on other grounds 478 F.2d 494 (9th Cir. 1973) cert. denied, 417 U.S. 920 (1974). The basis of these cases seems to be a fear of expanding the exclusionary rule, which Congress did not intend. See, e.g., *United States v. King*, supra. They conclude that only in cases such as *Berger* or *Katz*, where the interception is void ab initio, rather than in its execution, is total suppression necessary. Id.

Application of the literal terms of §§2515 and 2518(10), however, is also consistent with the traditional remedy applied in search cases. It has long been clear that unlawful execution of a search warrant voids the fruits of the search. See, e.g., *Sabbath v. United States*, 391 U.S. 585 (1968).

The closest analogy in the area of search and seizure of tangible objects is *Kremens v. United States*, 353 U.S. 346 (1957), which provides for total suppression where a search is so indiscriminate and sweeping as to be a general search. Basically, however, it is difficult to compare the search and seizure of tangible objects to intangible conversations. *Berger* recognized that the

latter case presents the greater potential for intrusion into the individual's privacy. Once seized, a conversation cannot be returned to the owner. *United States v. Focarile*, 340 F. Supp. at 1047. An interception is conducted over an extended period of time, and, in cases like this, does not discriminate. It is more likely to gather information of personal nature. The interception of a wire communication must necessarily be conducted without the interceptee's knowledge. This is not generally the case in a search and seizure of tangible objects. The greater danger of unnecessary intrusion requires a remedy that will insure its prevention. Total suppression must be that remedy.

The courts advocating the partial suppression remedy have failed to come to recognize the differences between the seizure of physical objects and an all-inclusive interception of conversations. Their reliance on cases like *United States v. Marron*, 275 U.S. 192 (19[redacted]) in which a prohibition agent authorized to seize liquor went beyond the scope of the warrant and unlawfully seized, in addition, a ledger, fails to recognize the difference. Where a wire interception is so unreasonably sweeping in scope as to become a proscribed general search, the search is void and the evidence must be suppressed. *Berger*, supra. See also Note, Minimization and the Fourth Amendment, 19 N.Y.L.J. 861 (1974); Note Minimization: In Search of Standards, 8 Suffolk U.L. Rev. 60 (1973). Those cases which distinguish between defects *ab initio* and defects in the execution are in error where, as here, the defect is so extensive as to make the interception a general search. When this occurs, the search is just as totally void and requires the same remedy of total suppression.

III.

BOTH SCOTT AND THURMON HAVE STANDING, AS AGGRIEVED PERSONS TO INSIST ON SUPPRESSION UNDER §2518(10)(a).

In its brief in opposition to the petition for a writ of certiorari, at p. 6, the Government argues that only Thurmon has standing to seek suppression of the wiretap evidence, because Scott was not overheard in a non crime-related conversation. The Government raised this argument in Scott I, and the Court of Appeals rejected it in the following language:

> "There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute. As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interception of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order of authorization or approval." (App. [redacted])

Section 2510(11), of course, defines an "aggrieved person" as a target of the interception or a party whose conversation was intercepted. As discussed above, Sections 2518(10)(a)(i) and (iii) mandate suppression sought by an aggrieved person when the communication was unlawfully intercepted or when interception did not conform with the authorization order.

The Government's proposed standing rule would twist the meaning of the relevant sections in a way not suggested in the legislative history. See *United States v. Bellosi*, 163 U.S. App. D.C. 273, 282 n.22, 501 F.2d 833, 842, n.22 (1974). See also *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505 (1974). The only justification offered is the statement by this Court in *Alderman v. United States*, 394 U.S. 165, 175, n.9 (1969), that the legislative history of Title III evidences no intent to go beyond the traditional standing notions discussed in the *Alderman* opinion. Both Thurmon and Scott, however, meet those criteria, since their conversations were intercepted unlawfully. Moreover, as the Court of Appeals pointed out in *Bellosi*, Congress also sought to incorporate the standing concepts of *Jones v. United States*, 362 U.S. 257 (1960), excluding from suppression those claiming benefit from unlawful acts directed at somebody else. 163 U.S. App. D.C. at 282, n.22, 501 F.2d at 842 n.22.

Ultimately, the Government's standing argument must fail for the same reason the suppression remedy is mandated by the act; one is victimized by a wiretap executed in violation of §2518(5) whether innocent conversations are overheard or not. It is the manner of interception not what is intercepted which creates the violation of the statutes and requires the remedy. By analogy to the law involving search for tangible objects, Scott, accepting the Government's view, is like the victim of a search which bore no fruits. He is still

"aggrieved" because his privacy interest was invaded.[22] Because of the unique nature of wiretaps, however, the entire interception is available for suppression, as the statute plainly dictates.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

SAMUEL DASH
MICHAEL E. GELTNER
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-2897

JOHN A. SHORTER, ESQ.
508 5th Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

Attorneys for Petitioners

[22] It is not at all clear that Scott was intercepted only in criminal conversations. Judge Waddy's decision rested solely on the Thurmon wiretap, finding the rest of the evidence, including the Lee wiretaps, to be derivative and, hence, unlawful. The Government's assertion of no innocent call by Scott, we assume, relates to the Thurmon wiretap, because the Lee wiretap transcripts are not in evidence. If the Court were to accept the Government's analysis of the standing issue now but accept petitioners' minimization argument, the appropriate remedy would be to remand to determine whether Scott was party to innocent calls on the Lee line Scott, of course, was not in a position to urge this analysis before, because, after the *Scott II* decision, he had no basis to claim illegality in the district court, and the court of appeals, in *Scott I*, had rejected the standing claim urged here.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Brief of Petitioners was mailed on December 6, 1977 to:

Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL E. GELTNER

No. 76-6767

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK R. SCOTT AND BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
RICHARD A. ALLEN,
Assistant to the Solicitor General,

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OPINIONS BELOW

The initial opinion of the district court (A. 1–24) is reported at 331 F. Supp. 233. The first opinion of the court of appeals (A. 27–34) is reported at 504 F. 2d 194. The district court's findings and conclusions on remand (A. 35–39) are unreported. The second opinion of the court of appeals (A. 40–53) is reported at 516 F. 2d 751, and the order of the court of appeals denying rehearing *en banc* (together with a dissenting opinion) (A. 54–57) is reported at 522 F. 2d 1333. The opinion of the court of appeals affirming petitioner's convictions (Pet. App. H) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. H) was entered on March 29, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 28, 1977. The petition was filed on May 19, 1977, and was granted on October 11, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the interceptions of wire communications in this case complied with the minimization requirements of the judicial orders authorizing the interceptions.

2. Whether the proper remedy for a failure of the monitoring agents to obey the minimization requirement of the order with respect to some conversations is the suppression of all intercepted conversations, including those that were properly intercepted.

3. Whether petitioner Scott, who was not an occupant of the premises in which the target telephone was located and all of whose conversations over that telephone were properly intercepted, has standing to contend that the agents violated the authorization orders in failing to minimize the interception of other conversations, to which he was not a party.

STATUTES INVOLVED

18 U.S.C. 2518(5) provides in pertinent part:

> * * * Every order [entered under this section] and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. 2518(10)(a) provides in pertinent part:

> Any aggrieved person in any trial, hearing, or proceedings in or before any court * * * of the United States * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> * * * * * *

18 U.S.C. 2510(11) provides:

> "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

STATEMENT

Following a non-jury trial on stipulated facts in the United States District Court for the District of Columbia, petitioner Scott was convicted of selling and purchasing narcotics not in the original stamped package, in violation of 26 U.S.C. (1964 ed.) 4704(a), and petitioner Thurmon was convicted of conspiracy to sell narcotics, in violation of 26 U.S.C. (1964 ed.) 7237(b) and 4705(a). Each was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. H).

1. THE INTERCEPT ORDERS

The evidence on which petitioners were convicted was derived from interceptions of telephone conversations in January and February 1970 under a court order issued on January 24, 1970, by United States District Judge John Lewis Smith, Jr., pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510–2520), and under an extension of that order issued on February 13, 1970. Judge Smith issued the initial order on the basis of an application by Assistant United States Attorney Harold Sullivan and an accompanying affidavit by Special Agent Glennon Cooper of the Bureau

of Narcotics and Dangerous Drugs ("BNDD") (A. 66–78) demonstrating probable cause to believe that nine named targets of the proposed interceptions, including petitioners, were participating in a conspiracy to import and distribute narcotics in the Washington, D.C., area. The affidavit also set forth reasons to believe that the conspiracy was utilizing a certain residential telephone listed to Geneva Thornton and that petitioner Thurmon, also known as Benjamin Thornton, had taken an order for a large quantity of narcotics on that telephone (A. 77).

On the basis of the application and affidavit, the court found probable cause to believe that a telephone listed in the name of Geneva Thornton (hereinafter "Geneva Jenkins") and located at 1425 N Street, N.W., Washington, D.C., was being used in the conspiracy (A. 79–80, 118–120).[1] The court also found probable cause to believe that the interception of wire communications over the target telephone would "concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and the illicit destination of these narcotic drugs in this jurisdiction" (A. 79–80).

Accordingly, the Court issued an order on January 24, 1970, under 18 U.S.C. 2518 authorizing special agents of the BNDD to intercept wire communica-

[1] "Geneva Thornton" was an alias used by Geneva Jenkins, who resided with petitioner Thurmon at the N Street premises during the period of the interceptions and was a co-defendant in this case (A. 2–8).

tions of petitioner Thurmon, co-conspirator Alphonso H. Lee,[2] "and other persons as may make use of the [target telephone]" (A. 80).

The order further provided, as required by Section 2518(5) (*ibid.*):

> [T]his authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications that are [not] otherwise subject to interception under chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days from date.[3]

The order directed Assistant United States Attorney Sullivan to provide a report to the court every five days detailing "the progress of the interception and the nature of the communication intercepted" (*ibid.*). On February 13, 1970, the court issued an 11-day extension order on the basis of a second application and affidavit (A. 100–117). The extension order also contained provisions for progress reports, termination, and minimization (A. 119-120).[4]

[2] Lee was subsequently indicted and convicted together with petitioners. His appeal is now pending in the court of appeals (No. 77–1092).

[3] The order inadvertently omitted the word "not," but the agents understood the order's intent (A. 18, n. 1). The order also inadvertently specified a 30-day period, but the agents understood it to mean 20 days, the period sought in the application (A. 18, n. 2).

[4] Between February 4 and February 24, 1970, pursuant to judicial orders, government agents intercepted conversations of the conspirators over two other telephones, located at 5195 Linnean Terrace, N.W., in Washington, D.C. The record contains no evidence concerning the manner in which these interceptions were conducted, and they are not at issue here (A. 95–97).

2. THE INTERCEPTIONS

Between January 24 and February 24, 1970, the monitoring agents listened to and tape recorded in their entirety 384 telephone calls, which constituted virtually all of the incoming and outgoing calls made over the target telephone during that period (A. 21, 145).[5] Either petitioner Thurmon or Geneva Jenkins was a party to every intercepted call.[6]

The nature of the intercepted calls and the manner in which the agents conducted the interception were subsequently described in some detail during two hearings on motions to suppress the calls, discussed below at pp. 8–12, 14–16.

Every five days during the interception, Mr. Sullivan submitted progress reports to Judge Smith that set forth, *inter alia*, the total number of calls intercepted and recorded during the period and the number of those calls that were identified as narcotics related (A. 81–83, 98–99, 121, 124). Those reports reflect that approximately 40 percent of the calls inter-

[5] At one point during this period the agents ceased the interceptions when they realized that telephone company personnel had connected the monitoring equipment to the wrong line (A. 132). Any calls made over the target telephone during that time were, of course, not intercepted.

[6] That fact is revealed in this transcripts of the calls (hereinafter designated as "I. Tr."), which were introduced in the suppression hearings and are part of the record in this case.

cepted were described in the reports as involving narcotics transactions (*ibid.*).

On the basis of the evidence developed by the interceptions, 22 persons were arrested and considerable quantities of narcotics were seized. Eventually, 14 persons, including petitioners and Geneva Jenkins, were indicted for substantive narcotics offenses and for conspiracy to commit those offenses (A. 1-2, 28).

3. THE DISTRICT COURT'S 1971 SUPPRESSION ORDER

Petitioners and the other defendants moved to suppress all of the intercepted conversations on a number of grounds, including the ground that the agents had failed to comply with the minimization requirement of the interception orders. A hearing was held on those motions before United States District Judge Waddy. Agent Cooper, the agent who supervised the interceptions, was the only witness who testified on the minimization issue.

Agent Cooper testified that he understood the interception orders "to restrict us to conversation relating to narcotics" and that he "relayed [those] instructions to the agents who would be manning the intercept" (A. 125). Agent Cooper testified that "[a]s it turned out the conversations, nearly all the conversations were recorded," but he denied the contention that the agents "did nothing in fact to limit * * * their overhearing of the conversations" or that the agents were "instructed to monitor all conversations" (A. 126). He stated, for example, that the agents were instructed not to monitor certain types

of privileged conversations, such as attorney-client, doctor-patient, or priest-penitent conversations (A. 126, 130).

With respect to other types of conversations, the monitoring agents' general approach and the problems they faced were described in the following colloquies (1971 Tr. 306–307):

> THE COURT: At this point let me inquire of you: There was some statement made in this hearing that often these conversations would begin with normal weather, family discussion etc. and then at the end of the conversation coded words would be used to identify that narcotics were being discussed in the conversation. Now, is that the way it was handled?
>
> [COOPER]: That is correct, sir, There were conversations of this type and the agents were aware of this probability.
>
> * * * * *
>
> THE COURT: Following up my last question, did the agents who manned these telephones know [at] the time that they were placed there that this type of condition would exist?
>
> [COOPER]: Yes, they did.

Agent Cooper testified that those difficulties made it necessary for the agents to monitor at least a portion of each conversation to determine its nature and thus to determine whether it was properly subject to interception. As he explained (1971 Tr. 309):

> The call was to be taken, was to be listened to, in order to determine several things, who was speaking, to whom, is it an individual that

> we had heard before, is it an individual that we have heard ordering narcotics, is it a principal in the case, is it an attorney, is it a doctor, what is the substance of the call—there were many things that we had to rely on. There was an extreme amount of coded language used and by this I mean improper terms were used—correct terms were not used to identify objects of contraband. It was up to the agent to sit and listen and to determine just what type of conversation he was listening to.

Agent Cooper also testified that he conferred with and relied to some extent on the advice of Assistant United States Attorney Sullivan in determining the types of calls that should not be intercepted (1971 Tr. 308–310), but that the monitoring agents conducted the interception on the understanding that they were to terminate the interception of any particular conversation if and when they determined that it was not properly interceptable. Thus, he stated that "[the interception] would have been shut off at the time the agent knew in his mind what the subject of the conversation was" (1971 Tr. 359). By way of illustration, Agent Cooper referred to another interception operation in which he had recently participated, which was conducted on the same basis. There the agents learned after monitoring several conversations that one user of the telephone typically discussed her illness with the particular friend, and accordingly the agents would shut off the interception whenever those two individuals came on the line (1971 Tr. 410–414). With respect to the interception in this case, however, when Agent Cooper was

asked whether he could "point to any discretion exercised by any agent at any time that resulted in the non-recordation * * * as to what was overheard," he responded that he could not (A. 131).

Agent Cooper was questioned at some length about certain intercepted calls, particularly 27 calls to obtain recorded time and weather information and seven conversations between Geneva Jenkins and her mother. He testified the time and weather calls were intercepted so that "[i]n the event that once it was terminated and another call was placed quickly thereafter, we would be that close" (A. 131). With respect to the conversations between Geneva Jenkins and her mother, Agent Cooper testified that while the agents had no information that the mother was involved in the conspiracy, they had some basis for believing she was aware of it (1971 Tr. 428–429; see also 1971 Tr. 349–351).[1]

After the hearing, Judge Waddy granted the defendants' suppression motions on the ground that the agents had failed to comply with the minimization requirements in Judge Smith's orders (A. 19–23). He concluded that they had failed to comply because virtually all conversations were intercepted, because "approximately 60% of the calls intercepted were

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[1] In one conversation, Geneva Jenkins told her mother that petitioner Thurmon was "out taking care of his business now" (A. 150). In another conversation, Geneva's mother said, "I got somethin to tell you I ain't gonna tell on no phone because you ain't suppose talk business on the phone" (A. 151). Another conversation referred to Alfonso Lee, one of the principals in the conspiracy (A. 150–151).

completely unrelated to narcotics," because "the record clearly depicts certain communications that could not possibly involve drugs," and because "[t]he record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls" (A. 21).

The government moved for reconsideration on the basis of an analysis of the transcripts of the calls prepared after the suppression hearing, which suggested that it was reasonable and consistent with the interception orders for the agents to have intercepted all but six of the 384 calls (A. 145–162).[8] The analysis classified 32.8 percent of the conversations as "in substance relate[d] to the narcotics enterprise," another 36.9 percent as so ambiguous that their purpose could not be determined, and another 14.3 percent as ones that could have been intercepted with a reasonable expectation that they would contain pertinent narcotics-related material.[9] The district court denied the motion without opinion on June 25, 1971 (A. 25–26).

[8] The call analysis was prepared by Assistant United States Attorney Phillip Kellogg, and the categories of calls were devised by him.

[9] The analysis divided the remaining conversations (16 percent of the total) into those related to narcotics in part (1.8 percent); those not directly related to narcotics but nonetheless of important evidentiary value (5.4 percent); recorded messages (7 percent); and conversations that could not have been intercepted with a reasonable expectation that they would contain pertinent materials (1.56 percent).

4. THE COURT OF APPEALS' 1974 DECISION

The government appealed under 18 U.S.C. 3731, and in June 1974[10] the court of appeals vacated the suppression order and remanded the case for an assessment of the reasonableness of the monitoring agents' conduct "on a considerably more particularized basis" than that made by the district court (A. 32, 34). The court ruled that the fact that 60 percent of the intercepted conversations "may appear in retrospect" to have been unrelated to narcotics did not necessarily mean that the interceptions were unreasonable (A. 33). Noting that "a substantial number of the intercepted conversations that cannot be classified as narcotics-related appear to have been either very short in duration or extremely ambiguous in nature, or both," and that the interception of such conversations "cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their

[10] The court of appeals deferred its decision pending its disposition of the already pending appeal in *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.), certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020, which also presented a minimization issue in a case where, as here, virtually all of the calls made were intercepted.

[11] In concluding that the agents in that case had not violated the minimization requirements, the court in *James* listed several factors that should be weighed in judging compliance with the minimization requirement, including (a) the scope of the criminal enterprise involved, (b) the extent to which the monitored telephone was being utilized in the illicit activity, (c) the government's expectation as to the contents of the calls, and (d) the extent of judicial supervision exercised over the execution of the interception (494 F. 2d at 1019–1021).

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termination" (A. 32), the court concluded that the 60 percent figure relied upon by the district court "substantially overstates the case for noncompliance with the order to minimize" (*ibid.*). It therefore directed the district court (*id.* at 33–34) to "accept the [government's] call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question" and to reassess the reasonableness of the agents' conduct in light of the court of appeals' intervening decision in *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.) certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020.[11]

5. THE REMAND PROCEEDINGS IN THE DISTRICT COURT

On remand the district court held a second suppression hearing, at which Agent Cooper and Assistant United States Attorney Kellogg testified. Agent Cooper reiterated his 1971 description of the way in

[11] The court of appeals rejected the government's contention that only Jenkins and petitioner Thurmon were "aggrieved persons" with standing under the statute (18 U.S.C. 2510(11)) to challenge the agents' alleged failure to minimize because the other defendants, including petitioner Scott, were not parties to any intercepted conversation that should not have been intercepted (A. 30–31). The court stated, however, that the government's argument was "correct" that a person would have no standing to urge suppression of a conversation in which he did not participate (A. 30–31, n. 5). The court found it unnecessary to decide the government's further contention (see Part II, *infra*) that the statute does not require suppression of conversations that were properly intercepted, but only of conversations that should not have been intercepted (*ibid.*).

which the agents had conducted the interception.[12] He also testified regarding his state of mind at the time of the interception, stating that there seemed to him to be two types of calls—those that were clearly narcotics related and those that were ambiguous (1974 Tr. 100). He indicated that the five-day reports to Judge Smith reflected his assessment at the time of the percentage of intercepted calls that were clearly narcotics related, but said that they did not reflect any conclusion by him that the other intercepted calls were clearly unrelated to narcotics (1974 Tr. 100–103). He also stated that the interception led the agents to realize that the operation involved many more people than they had originally believed, although it appeared to involve primarily local distribution of narcotics rather than importation from other states (A. 165).

Kellogg testified about the analysis of the calls that he had prepared, which divided the calls into various categories. He acknowledged that the monitoring agents themselves had not devised those categories and indicated that the analysis was simply an attempt to demonstrate the reasonableness of the agents' conduct (see, *e.g.*, A. 176; 1974 Tr. 384).

[12] Thus he again testified that the agents were aware that the orders required them to minimize nonpertinent calls and that they were never instructed to the contrary (1974 Tr. 92, 97, 126). He again stated that the agents could only determine by experience and after learning patterns of calls whether a particular call was likely to be "totally out of the realm of the purpose for which we were suppose[d] to be on the line" (*id.* at 94–96). He also testified that the agents had reasons to believe that the calls between Geneva Jenkins and her mother might shed light on the narcotics operation (*id.* at 87–88).

The district court again ordered all of the intercepted conversations suppressed (A. 35–39). The court did not find any errors in the government's call analysis, but it rejected it as having no bearing on the reasonableness of the actual conduct of the surveillance because, in the court's view, the analysis constituted "an after-the-fact non-validated presentation of counsel for the Government [which] does not and was not intended to establish that the monitoring agents complied with the minimization statute and order" (A. 38–39). On the basis of its finding that "the monitoring agents made no attempt to comply with the minimization order" (A. 36), the court concluded that the agents' "conduct would be unreasonable even if every intercepted call were narcotic-related" (A. 39).[13]

6. THE 1975 COURT OF APPEALS DECISION

The court of appeals again reversed (A. 40–55). The court reasoned that 18 U.S.C. 2518(5), which specifies that judicial orders authorizing interceptions are to require that they "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception," did not con-

[13] The district court did not discuss the standing of certain defendants to challenge the alleged failure to minimize or the government's contention that any failure to minimize requires only the suppression of conversations that should not have been intercepted. It stated only that "[f]ailure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. *Sabbath* v. *United States*, 391 U.S. 585" (A. 39).

template an absolute bar to the interception of such conversations, but rather imposed a standard of reasonableness, compliance with which could only be determined from the facts of each case (A. 43–46). The court further stated (A. 46) (footnote omitted):

> The trial court's error here lies in focusing on the reasonableness of the agents' intent rather than on the reasonableness of the particular interceptions which took place. The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied, but the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.

Undertaking its own review of the intercepted conversations, the court of appeals determined that approximately 40 percent were clearly narcotics-related and thus properly subject to interception under the order (A. 47). Of the remaining 60 percent, the court

found that "many were of very short duration and were terminated before their relevance could be determined," "[o]thers were extremely ambiguous in nature and possibly involved the use of codes to mask their true purpose," and "many were one-time conversations which afforded the monitoring agents no opportunity to develop a category of innocent calls whose interception should be minimized" (A. 47–48). The court identified only the seven calls between Geneva Jenkins and her mother "as potentially subject to a minimization requirement" (A. 48), but it concluded that their interception was not unreasonable since they contained references that could reasonably have led the agents to believe that the conversations might be pertinent to the narcotics conspiracy under investigation (A. 49). Having found "no category of conversation which would have required the institution of a minimization procedure by the monitoring agents" (*ibid.*), the court held that the interceptions were reasonable and did not violate the interception orders.[14] The court denied petitions for re-

[14] The court also concluded that the extent of the surveillance was not unreasonable under the standards established by its decision in *United States* v. *James*, *supra* (A. 49–52). With respect to Judge Smith's supervision of the wiretaps, the court noted that in view of the five-day reports submitted to him, the "judge was aware of the number of irrelevant conversations which were being intercepted and could have modified the wiretap authorization had he believed that any such action was appropriate" (A. 51). While the court found "no deficiency in the judge's supervision" (*ibid.*), it went on to state: "However, in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize" (A. 51–52).

hearing *en banc* (A. 54), and this Court denied a petition for a writ of certiorari, 425 U.S. 917 (A. 57).

7. THE TRIAL AND APPEAL

On remand to the district court, petitioners were tried and convicted on stipulated evidence consisting primarily of their intercepted conversations, which directly implicated them in the narcotics enterprise. The court of appeals affirmed the convictions (Pet. App. H).

SUMMARY OF ARGUMENT

I

1. Petitioners' principal contention appears to be that even though the monitoring agents could reasonably have intercepted every communication in full without violating the minimization requirements of the statute and the interception orders, the agents nevertheless violated those requirements because, petitioners allege, they subjectively intended to intercept every call without regard to those requirements.

Petitioners' argument proceeds from a legally unsound premise because, as the court of appeals correctly held, objective reasonableness, not subjective intent, is the proper legal standard for determining whether agents have complied with the minimization requirements of interception orders issued under Title III.

The minimization requirements of 18 U.S.C. 2518 (5) do not absolutely preclude any interception of non-pertinent communications, but rather impose a standard of reasonableness on agents conducting interceptions. The few statements of this Court on the

matter and the overwhelming weight of court of appeals' decisions establish that, for reasons of both justice and practicality, the reasonableness of a search or seizure depends on an objective assessment of the facts confronting the police at the time and not the officers' subjective motives.

Petitioners' reliance on cases explicating the deterrent policies of the exclusionary rule to support their claim that subjective motives must govern the lawfulness of actions fails to distinguish between what is necessary in the first instance to establish a constitutional or statutory violation and what is necessary to warrant the imposition of an exclusionary sanction. Decisions of this Court have recognized that, in view of the deterrent purposes of the exclusionary rule, considerations of official motives may in some cases militate against the application of an exclusionary sanction even though a constitutional or statutory violation has been established. *E.g., United States* v. *Janis,* 428 U.S. 433; *United States* v. *Calandra,* 414 U.S. 338. But neither those decisions nor other decisions of this Court support petitioners' contention that improper official motives alone can establish the violation in the first instance.

2. Petitioners' argument also proceeds from the erroneous factual assumption, unsupported by the record, that the agents harbored a subjective intent to act unreasonably or to disregard minimization requirements. Only by taking certain testimony of Agent Cooper out of context and by drawing illogical inferences from the fact that all conversations were

intercepted and from the interim reports made during the interceptions is it possible to conclude that there was any intent to ignore minimization requirements. In fact, the undisputed testimony of Agent Cooper shows that the agents did intend to respect their minimization obligations if the occasion to minimize had arisen.

3. Petitioners do not directly dispute the objective reasonableness of any interception in this case, and their argument makes no reference to particular interceptions. To the extent their argument could be read as disputing the objective reasonableness of the overall interception, it is erroneous.

The court of appeals correctly concluded that several factors in this case demonstrate the reasonableness of the interceptions. First, preliminary information available to the agents, confirmed during the course of the interception, indicated that the criminal enterprise under investigation was large. Second, either petitioner Thurmon or Geneva Jenkins, both known members of the conspiracy, was a party to every intercepted call. Third, many of the conversations used coded language, were otherwise ambiguous, or were too short to permit the agents to make any judgment about their likely content. Fourth, even with respect to the conversations that, in retrospect, appear to have been wholly innocent, that they would be so was not evident while they were being intercepted. Finally, the interceptions were conducted under reasonably close judicial supervision.

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II

If the Court accepts neither our contention that the agents did not violate minimization requirements nor petitioners' broad theory that the agents' allegedly unlawful subjective intent taints the interception of every conversation, but concludes that some conversations were properly intercepted and some conversations were not, Section 2518, general exclusionary rule principles, and the clear weight of decisional authority indicate that suppression is required only with respect to those conversations that were not properly intercepted. Petitioners' claim that suppression only of improperly intercepted calls would not provide adequate deterrence is contrary to this Court's analysis of the policies and proper application of the exclusionary rule. Moreover, Title III contains specific statutory remedies that are better designed to curb excessive interceptions than the wholesale exclusion of all communications, properly as well as improperly intercepted.

III

Petitioner Scott, who has never contended that he was a party to innocent conversations that could not reasonably have been intercepted, has no standing to claim, as a basis for suppressing his own intercepted conversations, that the agents violated minimization requirements when they intercepted the communications of other persons.

ARGUMENT

I

THE INTERCEPTIONS OF WIRE COMMUNICATIONS IN THIS CASE COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF THE ORDERS

Petitioners' contentions with respect to the first issue presented in their petition and brief are not entirely clear. From their statement of the issue (Br. 4) and their argument on it (Br. 19), petitioners appear to be contending that even though the agents could reasonably have intercepted every conversation without violating the statute or the interceptions orders, they nevertheless violated the statute and the orders because they subjectively intended to intercept every call without regard to the minimization requirements—that is, if there had been calls they should not have intercepted, they would have intercepted them anyway. That argument warrants two preliminary observations.

First, the argument based on subjective intent does not dispute—indeed it assumes—that each individual call could have been reasonably intercepted. In fact, petitioners do not challenge the government's call analysis or the court of appeals' independent analysis of the calls; their argument simply makes no reference to any specific calls or categories of calls.

Second, the argument proceeds from several factual suppositions that are not supported by the record. For example, the argument assumes that the

agents subjectively intended to intercept every call without regard to the minimization requirements of Judge Smith's orders. It also assumes that the agents, while they were conducting the interceptions, concluded that 60 percent of the calls were not crime related but intercepted them nevertheless. Both those assumptions, as we show in Part I(B), *infra*, are contrary to the record.

Although petitioners do not point to any specific call or group of calls to establish a failure to minimize on the part of the monitoring agents, they also appear to argue, as an alternative to their claim that all of the interceptions were tainted by the agents' allegedly improper subjective intent, that the interception as a whole was objectively unreasonable when assessed in light of various standards established by the court of appeals (Br. 25–29). That argument does not focus on the calls themselves but on other circumstances, such as the scope of the criminal conspiracy, the location of the telephone, and the degree of judicial supervision of the interception.

To respond to all of the issues potentially raised by petitioners' arguments on the first question presented, we will argue (1) that objective reasonableness is the proper standard for determining whether agents have complied with the minimization requirement of orders issued under 18 U.S.C. 2518; (2) that the record does not in any event establish that the agents in this case subjectively intended to violate the minimization requirements of the orders; and (3) that the record establishes that the interceptions complied with the

statute and the interception orders issued pursuant to it.

A. THE COURT OF APPEALS CORRECTLY HELD THAT OBJECTIVE REASONABLENESS IS THE PROPER STANDARD FOR DETERMINING WHETHER AGENTS HAVE COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF WIRE INTERCEPTON ORDERS

Assuming *arguendo* that the agents in this case subjectively intended to intercept all conversations and to disregard the requirement that they minimize interceptions of non-pertinent conversations (but see Part I(B), *infra*, pp. 34–39), there nevertheless was no violation of Section 2518(5) or the interception orders unless an objective assessment of their conduct reveals a failure to minimize.

Section 2518(5) provides that a judicial order authorizing the interception of wire communications is to contain a requirement that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Section 2518(10)(a)(iii) authorizes any "aggrieved person" to move to suppress any intercepted conversation on the ground that "the interception was not made in conformity with the order of authorization or approval." [15] On its face, the statute does not directly

[15] The statute does not directly impose a minimization requirement on agents conducting an interception, but imposes that requirement through judicial orders issued under the statute. Petitioners' suppression motions were therefore not based on Section 2518(10)(a)(i) or (a)(ii), which authorizes suppression when the "communication was unlawfully intercepted" or when the "order of authorization * * * is insufficient on its face," but on Section 2518(10)(a)(iii).

prohibit the interception of non-relevant communications or require the suppression of such conversations; as the court of appeals noted (A. 43), the use of the word "minimize" reflects that Congress contemplated that some non-relevant conversations would inevitably be intercepted. Rather, as its language and legislative history indicate, Section 2518(5) was meant to impose a requirement of reasonableness in executing the judicially authorized search similar to the requirement generally imposed by the Fourth Amendment.[16] And the use of the word "conducted" in the minimization provision of the statute confirms that the focus is properly on the agents' actions and not on their thoughts.

Petitioners proceed on a legally erroneous premise in contending that the interceptions in this case, even if objectively reasonable when assessed in light of the facts and circumstances existing at the time, were nevertheless unlawful if the agents subjectively intended to intercept all communications in their entirety. None of the cases cited by petitioners (Br. 22–23) supports their contention; indeed, those citations indicate that petitioners have failed to distinguish between what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established (see pp. 32–34, *infra*).

The question whether an individual has complied with or violated a legal requirement of reasonable-

[16] See S. Rep. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968); *United States* v. *James*, *supra*, 494 F. 2d at 1018.

ness—in the context of the Fourth Amendment, Section 2518, or any other rule of law—has always and of necessity turned upon an objective assessment of his actions in light of the facts and circumstances confronting him at the time. At least in Anglo-American jurisprudence, subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional.[17] An example from the law of search and seizure will illustrate the point: suppose a police officer sets out to arrest an individual whom he has no reason to suspect of having committed a crime, but finds that individual in the act of committing a crime and arrests him. It is clear that the arrest would not be unreasonable or unconstitutional merely because of the officer's subjective intent to make an arrest regardless of the circumstances. If the arrest is in fact reasonable under the circumstances, the individual's constitutional or statutory rights against unreasonable arrest have not been infringed. Conversely, if the facts known to the officer at the time of the arrest, objectively viewed, did not give rise to probable cause, the arrest is unlawful even if the officer subjectively believed otherwise.

[17] Of course subjective intent to do a prohibited act is often a necessary element of responsibility for that act, and except in a small category of cases is always a necessary element of criminal culpability. But it is never a sufficient element by itself; every violation of law also requires commission of an unlawful act. Moreover, improper subjective intent is not a necessary element of a Fourth Amendment violation; a policeman may violate the Fourth Amendment even though he subjectively believes that his conduct is reasonable or supported by probable cause. See *Terry* v. *Ohio*, 392 U.S. 1, 21–22.

The question of the selection of a criterion—objective or subjective—for evaluating the reasonableness of a search under the Fourth Amendment is not one that this Court appears to have explored at length in any of its decisions. There are, however, strong indications in several cases that an objective standard is to be applied, and that view is supported by the great weight of court of appeals' decisions. The question was addressed by the Court in *Terry* v. *Ohio,* 392 U.S. 1, 21–22 (footnote omitted). In discussing how to assess the reasonableness of a stop and frisk, the Court stated:

> [I]t is imperative that the facts be judged against an objective standard * * *. * * * [S]imple "'good faith on the part of the arresting officer is not enough.' * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio,* [379 U.S. 89] at 97.

See also *Henry* v. *United States,* 361 U.S. 98; Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 373 (1974).

And in *United States* v. *Robinson,* 414 U.S. 218, the Court upheld the search of an arrestee incident to a lawful arrest against a claim that the motivation for the search exceeded the legal justification for the search-incident exception, stating (*id.* at 236): "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [Officer] Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed."

With virtual unanimity, the courts of appeals have followed those principles and have assessed searches or seizures by their objective reasonableness, without regard to the alleged subjective motive of the officers involved. For example, in *United States* v. *Bugarin-Casas,* 484 F. 2d 853, 854, n. 1 (C.A. 9), certiorari denied, 414 U.S. 1136, the court observed that "[t]he fact that the agents were intending at the time they stopped the car to search it in any event * * * does not render the search, supported by independent probable cause, invalid." [18]

Our research has disclosed only two court of appeals decisions that may be viewed as having determined the issue of Fourth Amendment compliance on the basis of the officers' subjective motives, although the

[18] See also, *e.g.*, *United States* v. *Stratton,* 453 F. 2d 36 (C.A. 8), certiorari denied, 405 U.S. 1069; *White* v. *United States,* 448 F. 2d 250, 254 (C.A. 8); *Dodd* v. *Beto,* 435 F. 2d 868, 870 (C.A. 5); *Klingler* v. *United States,* 409 F. 2d 299, 304 (C.A. 8), certiorari denied, 396 U.S. 859; *Smith* v. *United States,* 402 F. 2d 771 (C.A. 9); *Greene* v. *United States,* 386 F. 2d 953, 956 (C.A. 10); *Sirimarco* v. *United States,* 315 F. 2d 699, 702 (C.A. 10), certiorari denied, 374 U.S. 807; cf. *United States* v. *Welsch,* 446 F. 2d 220 (C.A. 10); *United States* v. *Lee,* 308 F. 2d 715 (C.A. 4). With respect to a related issue, courts that have considered the question have generally concluded that whether or not an individual has been arrested or placed in custody depends on an objective assessment of the circumstances and not upon whether the officers subjectively intended to prohibit the individual from leaving if he had tried. See *Lowe* v. *United States,* 407 F. 2d 1391, 1397 (C.A. 9); *Allen* v. *United States,* 390 F. 2d 476, 479 (C.A. D.C.); *Williams* v. *United States,* 381 F. 2d 20, 22 (C.A. 9); *People* v. *Arnold,* 66 Cal. 2d 438, 449, 426 P. 2d 515, 522.

issue was not analyzed in the opinions.[19] However, in one of those cases, *Commonwealth of Massachusetts* v. *Painten*, 368 F. 2d 142 (C.A. 1), in which this Court dismissed the petition for a writ of certiorari on the ground that the record was not sufficiently clear on the issue, 389 U.S. 560, 561, Mr. Justice White stated what we believe to be the correct view in his dissent from the dismissal:

> The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way [can] contaminate all of his later behavior. * * * That such a rule makes no sense is apparent * * *. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

389 U.S. at 564–565; see also *id.* at 562 (Fortas, J. concurring).

[19] *United States* v. *Cooks*, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996; *Commonwealth of Massachusetts* v. *Painten*, 368 F. 2d 142 (C.A. 1), certiorari dismissed as improvidently granted, 389 U.S. 560. Contrary results in similar circumstances were reached in *United States* v. *Welch*, *supra*; *Sirimarco* v. *United States*, *supra*; and *United States* v. *Lee*, *supra*.

The focus of the courts on actions rather than thoughts reflects considerations both of justice and practicality. As the Court noted in *Terry*, an individual's right to be free from unreasonable official invasions of privacy are best secured by considering whether or not the invasion is justified by the facts and circumstances known to the officer. Moreover, as Mr. Justice White indicated in *Painten*, it would make little sense to conclude that when two officers, each possessing facts sufficient to support probable cause to arrest an individual, make an arrest, the Fourth Amendment rights of the individual have been violated by one officer because he intended to make the arrest regardless of probable cause, yet have not been violated by the same action on the part of the other officer, if the latter harbored no such purpose.

The practical considerations include the difficulty to which Mr. Justice White alluded of reliably ascertaining subjective intent (something we hereafter contend the district court failed to do in the instant case), particularly in the absence of objective facts evidencing illegality. Where the action in question (here, intercepting conversations) is the product of human decision made in relation to particular existing circumstances, it is rarely possible to conclude with assurance what decision would have been made in other circumstances.

Petitioners, however, argue (Br. 22–24) that the agents' subjective intent rather than an objective analysis of the facts must determine the legality of their actions because of the established principle that

a search may not be justified by what it ultimately discloses. That argument misconceives the nature of the analysis of the calls performed by the government and the court of appeals. That analysis examined the very conversations to which the agents were listening, and its conclusion—that the agents acted reasonably in listening to all but a *de minimus* number of calls—did not rest upon what the interceptions ultimately disclosed, but upon the reasonableness of the act of listening in view of the nature of the conversations being overheard.[20]

In support of their claim that the monitoring agents' compliance with the minimization requirement of the interception orders must be measured by their subjective intent, petitioners also rely (Br. 22) on decisions of this Court establishing that the principal purpose of the exclusionary rule is to deter police misconduct. *E.g., United States* v. *Calandra,* 414 U.S. 338, 347. Those decisions are inapposite. Petitioners apparently have failed to distinguish between what is necessary in the first instance to show a violation of constitutional or statutory requirements concerning searches and seizures and what is necessary to warrant imposition of an exclusionary sanction once a violation has been established.

[20] The fact that the information and circumstances confronting the agents at the time are more fully developed after the fact does not, contrary to petitioners' contention (Br. 23), constitute an impermissible "after-the-fact analysis of the results of police conduct" or "validat[e] [their conduct] by the ultimate results" (Br. 22). Every suppression hearing that fully develops the facts and circumstances of a search and seizure is, in a sense, an after-the-fact analysis.

The cases cited by petitioners deal with the latter question, and we of course do not dispute that once a violation has been shown, the police officers' motives or good faith may be relevant, even controlling in some circumstances, in determining whether to impose an exclusionary sanction. Thus, for example, in *United States* v. *Janis,* 428 U.S. 433, the Court held that the exclusionary rule should not be applied to suppress in a federal civil tax proceeding evidence that had been unconstitutionally seized by state police officers, because, the Court reasoned, "the imposition of the exclusionary rule * * * is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest." 428 U.S. at 458. Thus, in *Janis, Calandra,* and similar cases the Court has recognized that, in view of the deterrent purposes of the exclusionary rule, consideration of official motives may militate against the application of the exclusionary rule even though a constitutional violation has been established. This is a far cry from petitioners' contention that improper official motives alone can establish the violation in the first instance and can render otherwise lawful conduct unlawful, and we know of no decision of this Court holding or even intimating the correctness of such a proposition.[21]

[21] Several decisions upholding the interception of communications have made reference to the agents' "good faith" efforts to minimize as one of the reasons supporting the lawfulness of the interceptions. See, *e.g., United States* v. *Hinton,* 543 F. 2d 1002, 1012 (C.A. 2), certiorari denied *sub nom. Bates* v. *United States,* 429 U.S. 1066; *United States* v. *Quintana,* 508 F. 2d 867, 875 (C.A.

(Continued)

In short, the court of appeals correctly held that the lawfulness of the interceptions in this case must turn upon an objective assessment of the facts and circumstances confronting the agents at the time.[22]

B. THE RECORD DOES NOT IN ANY EVENT SUPPORT PETITIONERS' ASSUMPTION THAT THE AGENTS SUBJECTIVELY INTENDED TO DISREGARD THE MINIMIZATION REQUIREMENTS OF THE INTECEPTION ORDERS

While, as we have argued above, improper subjective motives do not render unlawful actions that are otherwise objectively reasonable, the record in this case does not in any event support petitioners' assump-

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7); *United States* v. *Tortorello*, 480 F. 2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866. Whatever the merits of this proposition, there is little basis for inferring from those statements the converse proposition—that absence of "good faith" would render unlawful objectively reasonable interceptions—since that issue was not presented in those cases and since those decisions did not discuss, or apparently consider, the authorities establishing the principle that statutory and constitutional compliance must be judged on the basis of objective criteria. Thus, we take those statements to suggest that good faith is relevant in determining the appropriate suppression remedy, but there must first be a finding of a violation before it is appropriate to consider what should be suppressed.

[22] As the court of appeals recognized (A. 46), "[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied * * *." If evidence reflects that police officers intended to do something without regard to constitutional or statutory requirements, that fact may be probative in assessing the credibility of the officers' claims that their actions were in fact based on information or other circumstances that would make their actions lawful. Here the assessment of the agents' compliance with the statute was based on an objective analysis of the communications they listened to, and there was therefore no occasion to factor the agents' allegedly improper motives into that assessment.

tion—essentially unsupported by any analysis based on the record—that the agents entertained a subjective intent to act unreasonably or to disregard the minimization requirements of Judge Smith's orders. Indeed, the undisputed testimony in the record supports the contrary conclusion.

As outlined in the Statement (pp. 8–11, 14–15, *supra*), Agent Cooper testified that the agents were aware that the orders "restrict[ed] us to conversation relating to narcotics" and that he "relayed [those] instructions to the agents who would be manning the intercept" (A. 125). Agent Cooper consistently denied that he instructed the agents to monitor all conversations (A. 126; 1974 Tr. 92, 126) and testified that the instructions that he did give specifically directed the agents not to monitor conversations likely to contain privileged communications (A. 126).[23] Moreover, Agent

[23] It is unwarranted to infer that Agent Cooper, by specifically prohibiting any interception of certain types of calls, implicitly instructed the agents to intercept all other calls in full. The privileged calls were mentioned as examples of calls that would not have been subject to interceptions at all. While Agent Cooper testified (A. 126) that "[the agents] were instructed to monitor calls except for those calls which fell into a privileged nature, certain restricted types of calls," that statement must be understood in the context of his testimony as a whole, the thrust of which was that the interception or non-interception of other types of calls would have to depend on the agents' ability to develop patterns among the calls after "monitoring" at least some portion of those calls at the outset of the operation. (See, *e.g.*, 1974 Tr. 94, 96.) In any event, if petitioners are contending that the agents understood Agent Cooper's instructions implicitly to require the total interception of all other calls, it was their burden to call those agents and explore their understanding. *Nardone* v. *United States* 308 U.S. 338, 341; cf. *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7).

Cooper testified that this intercept was conducted on the same basis as another intercept in which he had previously participated and in which the agents, after developing patterns among the calls, would not intercept calls they had reason to believe would be irrelevant (1971 Tr. 410–414).

The district court's conclusion that there was an "admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order" (A. 39) appears to be based on three underlying facts or conclusions, none of which, individually or collectively, sustains the conclusion:

1. Finding No. 4 (A. 36) states that the agents listened to and recorded all calls. This is correct, but, standing alone, it is insufficient to sustain the conclusion that the agents made no attempt to meet their obligation to minimize, as petitioners themselves have recognized.[24] If a man drives to work without encountering, and therefore without stopping at a red light, it would be a non-sequitor to conclude from this fact that he entertained no intent to stop at red lights. The district court's conclusion is similarly a non-sequitor, unless bolstered by independent evidence of intent.

2. Finding No. 10 (A. 37) sets forth certain testimony of Agent Cooper as constituting an admission that the agents purposefully disregarded the minimization requirement. The testimony quoted in the finding involves an affirmative response to the following

[24] See Petitioners' Reply to the United States Brief in Opposition to Certiorari, p. 1.

question from the court: "Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?" While this testimony, taken out of context, might appear to support the court's conclusion, it is quite apparent when the testimony is considered in context that Agent Cooper meant by his answer simply that this was the only occasion that conversations were not in fact intercepted, not that the agents never otherwise gave consideration to the minimization reqirement of the order.[25]

3. Finding No. 9 (A. 36) recites the fact that the reports periodically submitted to Judge Smith during the course of the interception classified 40 percent of the intercepted calls as narcotics related and 60 percent as not being narcotics related. It is assumed by petitioners from this fact that the agents recognized at the time that they were intercepting a large number of calls that should not have been overheard under the minimization requirement. In fact, Agent Cooper testified that the figures were intended to reflect the proportion of calls that were clearly narcotics related, but that he had not meant to classify the remainder as clearly not related to the offense under investigation (1974 Tr.

[25] The confusion about the colloquy between the district court and Agent Cooper may derive from the ambiguity of the court's questioning. The court consistently used the term "minimization" as a synonym for non-interception (see 1974 Tr. 680, 681, 685; see also 1974 Tr. 98), although the concepts are in fact quite different.

100–104). Rather, he viewed most of the other calls to be ambiguous (*ibid.*).[26]

The record affords no basis for concluding that the agents proceeded in bad faith in this case, that is, with the intent to ignore the legal duty that they understood to be imposed on them by the minimization requirement. At worst, their understanding of the legal standards for administering the minimization requirement may have been different from the criteria ultimately established by the courts (*i.e.*, they may have made "no attempt to comply" with minimization requirements not articulated with particularity in the intercept order or yet enunciated by the courts). Thus, even if the record could be read to support the conclusion that the agents would have intercepted conversations of a kind that this Court concludes should not have been intercepted—and we believe the record would not support such speculation—it would not indicate "bad faith" on the part of the agents.

In sum, even if subjective intent were thought to be relevant to the issue of the agents' compliance with the minimization provision of the intercept orders, the record provides no basis for concluding that their intent was improper.[27] See also *United States* v.

[26] In such instances, even though it may retrospectively appear that interception of the call was not necessary, this could not have been known to the agents contemporaneously with the interception, and accordingly the fact of interception does not evidence any purpose to ignore the minimization requirement.

[27] Petitioners err in contending (Br. 27) that the district court's findings should not have been overturned by the court of appeals because they were not "clearly erroneous." See Fed. R. Civ. P. 52. If petitioners' contention relates to any conclusions concerning the agents' subjective intent, the record on that issue is undisputed. Petitioners do not deny Agent Cooper's testimony, and the district court's conclusions are not based upon determinations of credibility or on choices between conflicting testimony. The only question is the permissible inference to be drawn from the undisputed facts, and that is a question of law.

Chavez, 533 F. 2d 491 (C.A. 9), certiorari denied, 426 U.S. 911, finding good faith compliance with minimization requirements on a similar record.

C. THE INTERCEPTIONS IN THIS CASE WERE REASONABLE AND COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF THE INTERCEPTION ORDERS

As we noted at the outset (p. 23, *supra*), petitioners point to no particular conversation or group of conversations that could not reasonably have been intercepted in their entirety. Rather, they contend that the interceptions violated Judge Smith's order because the agents allegedly harbored an unlawful intent to intercept without regard to the minimization requirement. Nevertheless, petitioners also assert that the court of appeals' "acceptance of [the] retrospective statistical analysis could not support its result for several other reasons" (Br. 25). We now turn to a consideration of this argument.

The first reason assigned for petitioners' claim is the completely incorrect assertion that "the district court found that the call analysis contained errors of characterization and factual inaccuracies and did not represent information known to the agents at the time of interception" (Br. 25–26). No citation is given for that statement, and the district court made no such

findings (see A. 35–39).[28] Second, petitioners appear to contend (Br. 26–29) that the interceptions as a whole were unreasonable because the courts of appeals have identified a number of general factors to be considered in assessing the reasonableness of interceptions, which, applied to this case, allegedly demonstrate the unreasonableness of these interceptions. However, as the cases cited by petitioner (Br. 26) indicate, those factors (*e.g.*, the character and scope of the criminal enterprise, and the degree of judicial supervision) are to be utilized in connection with particularized assessment of the interceptions themselves. They cannot be applied in a vacuum, and petitioners' failure to discuss the intercepted calls themselves renders their analysis meaningless.[29]

Nevertheless, because petitioners' arguments could be read as also challenging the objective reasonable-

[28] Not even Finding No. 12a (A. 38) could arguably support petitioners' statement. That finding states: "The 'call analysis' conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case." The finding reflects only the district court's view that the call analysis' characterizations differed from the agents' characterizations of the calls; it does not suggest any conclusion that the call analysis was factually erroneous or relied on information not known to the agents at the time.

[29] Under the analysis employed by most courts, the interception of a particular call might be reasonable if, for example, the criminal enterprise was a large one or if the agents had reason to believe the parties to the call to be criminally involved, whereas interception of the same call might not be reasonable if the criminal enterprise were a one-man operation or if the agents had no reason to believe the parties to the conversation were implicated in the offense. But the analysis has to begin with a consideration of the communication itself.

ness of the interceptions, we shall briefly identify the considerations supporting the court of appeals' conclusion that the interceptions in this case were objectively reasonable.

We begin by noting that the situation of an agent monitoring telephone conversations pursuant to a judicial authorization is analogous to that of an officer searching a house pursuant to a search warrant. The conventional equivalent to the minimization requirement is the obligation of a searching officer—which may arise from explicit restrictions in the warrant or be inferred from the reasonableness requirement of the Fourth Amendment itself—to confine the search to those areas where it may reasonably be expected that the items identified in the warrant might be found. The officer may not, for instance, search desk drawers for a stolen television set. On the other hand, the officer may search any room of the house where the television set could be, without having probable cause to believe that it is in any particular room.

Similarly, in applying the minimization requirement, the officers may listen to any conversation that they reasonably believe could relate to the offenses under investigation, without having probable cause at the outset to believe that a particular conversation will in fact evidence the crime. If, on the other hand, it becomes clear that a particular conversation will not relate to the offense, the interception of that conversation should be terminated. It is difficult to lay down hard and fast general rules to implement these principles, however, since the proper approach in any par-

ticular investigation will depend upon a number of variables.

As a general matter, as the court below noted (A. 44), the very nature of an intercept operation requires monitoring agents to listen to some portion of every call in order at least to determine the identity of the parties to it. How much of the call they should reasonably listen to depends on a large number of factors, many of which can only be applied after the agents have developed patterns among the calls.[30] A call between two persons known to the agents to be wholly ignorant of the subject of the investigation should, of course, ordinarily not be intercepted as soon as the agents determine the identity of the callers. Conversely, where one or both parties to the call are known participants in the criminal enterprise, it ordinarily would be reasonable to listen to the entire conversation or at least a significant portion of it. It is impossible to develop any formula that can be applied in advance. In this case, we submit that a number of factors demonstrate the reasonableness of the interceptions.

1. From the outset, the agents had reason to believe, as the affidavits in support of the authorization applications reflect (A. 89–94), that the target telephone was being used in a large narcotics operation. What the agents learned during the course of the interceptions confirmed that belief; indeed, as Agent Cooper testified, they discovered that the operation involved many more people than they had originally suspected

[30] See *e.g.*, *United States* v. *Quintana*, *supra*, 508 F. 2d at 874.

(A. 165). As the courts have generally recognized, the size of the criminal enterprise is a factor supporting greater leeway in conducting interceptions. See, *e.g.*, *United States* v. *James*, *supra*, 494 F. 2d at 1019–1020; *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8), certiorari denied, 417 U.S. 918.[31]

2. The transcripts of the intercepted conversations reveal that either petitioner Thurmon or Geneva Jenkins was a party to every intercepted call. Thurmon was a principal target of the interceptions, and the transcripts of the calls reveal that Jenkins' participation became apparent during the first few days of the overhearings (A. 150; I Tr. 131–132). Accordingly, it was not unreasonable for the monitoring agents, after identifying one of the parties to each conversation as a participant in the conspiracy, to continuing listening for at least some period of time with the expectation that the conversation might shed light on the criminal investigation.

3. As Agent Cooper testified (1971 Tr. 309; 1974 Tr. 100) and as the analysis of the calls established (A. 145–147), many of the conversations used coded language or were otherwise ambiguous, and their subject matter could not therefore be readily determined by the monitoring agent. Thus, as Agent Cooper also testified (1974 Tr. 100–104), the fact that the agents, reporting to Judge Smith through Assist-

[31] The fact, relied on by petitioners (Br. 27), that the conspiracy turned out to involve local distribution of narcotics rather than out-of-state importation as originally thought has no bearing on the size of the operation that the intercepts gradually revealed. And unlike the size of an operation, its geographical scope has little direct bearing on minimization obligations.

ant United States Attorney Sullivan, described 40 percent of the intercepted calls as narcotics related did not mean that they recognized the other calls as clearly unrelated to the criminal enterprise; in fact, some of them may have been related even though it is not possible to determine the fact reliably.

4. Many calls were of extremely short duration, consisting, for example, of wrong number calls, calls in which the person called was not at home, or calls to obtain recorded time and weather information (A. 47, n. 15; A. 145).[32] With respect to the interception of recorded messages providing information available to the public at large, the monitoring agents had no reason to believe that their interceptions would invade anyone's privacy interest, which was clearly the concern of the minimization requirements of the statute and Judge Smith's orders.[33] With respect to the other calls, the agents had no way of determining whether or not the call would be relevant until the call was over.

5. As the court of appeals noted (A. 48), the only calls that have been identified "as potentially subject

[32] The government's call analysis does not break down the calls on the basis of their duration, but examination of the transcripts reveals that many were extremely short.

[33] Since the only information gained from the interception of such a call is the fact and the time of the call, and since that information could be as readily gained from the use of a pen register device alone, it may be doubted whether such an interception falls within the statutory definition of "interception" at all. See S. Rep. 1097, *supra*, at 90.

to a minimization requirement" were seven calls between Geneva Jenkins and her mother. While those calls ultimately proved to be unrelated to the conspiracy, the testimony of Agent Cooper (1974 Tr. 87–89), the government's call analysis (A. 149–153), and the court of appeals' own independent analysis (A. 48–49) abundantly demonstrate that the agents had reasonable grounds to believe that Jenkins' mother knew about the conspiracy and that certain portions of the conversations alluded to it. Petitioner do not challenge those conclusions.

6. Finally, the facts of this case reflect that the agents here were under reasonably close judicial supervision. They submitted reports of their progress every five days to Judge Smith indicating the total number of calls intercepted and the number of those that they positively identified as narcotics related. While that fact alone does not establish the reasonableness of their conduct, it minimized the risk, which the mechanisms of Title III were enacted to prevent, of significant invasions of privacy that might otherwise have resulted from interceptions conducted without the restraining influence of such judicial oversight. See *United States* v. *James, supra,* 494 F. 2d at 1021; *United States* v. *Bynum,* 485 F. 2d 490, 501 (C.A. 2), vacated on other grounds, 417 U.S. 903; *United States* v. *Cox, supra,* 462 F. 2d at 1301.

II

ASSUMING *ARGUENDO* THAT THE AGENTS IN THIS CASE VIOLATED THE MINIMIZATION REQUIREMENTS OF THE INTERCEPTION ORDERS BY INTERCEPTING SOME CONVERSATIONS THAT COULD NOT HAVE BEEN REASONABLY INTERCEPTED, 18 U.S.C. 2518(10) DOES NOT REQUIRE THE SUPPRESSION OF ALL INTERCEPTED CONVERSATIONS

We have argued in Part I, *supra*, that the agents in this case complied with the minimization requirements of Judge Smith's orders. If the Court disagrees with our contention, it would be presented with two additional questions: first, whether Section 2518(10)(a) requires the suppression of all intercepted communications or only those communications that were not properly intercepted; and second, the standing of petitioner Scott to challenge the use of the interceptions against him. We discuss the first question in this Part and the second question in Part III, *infra*.

If petitioners' position—that the alleged improper subjective motives of the agents rendered unlawful their interceptions of all conversations, regardless of the content of any conversation—were accepted, it would follow that every conversation, even those directly concerned with the conspiracy to distribute narcotics, was improperly intercepted and that any party to a conversation would have standing to require its suppression. We assume for the sake of the discussion here that this extreme position is not accepted, and further assume (contrary to our argument above and the court of appeals' conclusion) that we are dealing with a case where some communications were intercepted in violation of the minimization requirements and others were not. In that situation, we submit that under the statute and prevailing case law only those communications that should not have been intercepted are required to be suppressed.

Our contention is supported by the terms of Section 2518(10)(a). That provision states in pertinent part that "[a]ny aggrieved person * * * may move to suppress the contents of *any* intercepted * * * communication * * * on the grounds that * * * (iii) *the* interception was not made in conformity with the order of authorization or approval" (emphasis supplied). If a particular communication was intercepted in conformity with the authorization order, a natural reading of the statute clearly suggests that it is not subject to suppression.[34]

Most of the cases considering the issue have agreed that the statute does not require the suppression of those communications that were properly intercepted.[35] The cases cited by petitioners (Br. 31–32) for a contrary position either found that there was no violation of the minimization requirement, in which event there was no occasion to rule on the scope of the sup-

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[34] It would strain the statute considerably to read it, as petitioners do (Br. 32), to require the suppression of *all* intercepted communications on the grounds that *any* (even one) of those communications was intercepted in violation of the order. The statute clearly intended to relate the communications to be suppressed to the communications improperly intercepted, as further confirmed by subsection (a)(i) of Section 2518(10), which authorizes suppression on the ground that "*the* communication was unlawfully intercepted" (emphasis supplied).

[35] *United States* v. *Cox*, 462 F. 2d 1293, 1301–1302 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *Sisca*, 361 F.

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pression remedy,[36] or held that all the communications were intercepted in violation of the authorizing order.[37]

The proposition that Section 2518(10)(a) does not require the suppression of conversations that were properly intercepted is consistent with the general exclusionary rule principle that suppression is required only of evidence that is obtained as a result of unlawful conduct—that is, evidence that is the fruit

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Supp. 735, 746–747 (S.D. N.Y.), affirmed, 503 F. 2d 1337 (C.A. 2); *United States* v. *Mainello*, 345 F. Supp. 863, 874–877 (E.D. N.Y.); *United States* v. *King*, 335 F. Supp. 523, 543–545 (S.D. Cal.), reversed on other grounds, 478 F. 2d 494 (C.A. 9), certiorari denied, 417 U.S. 920; *United States* v. *LaGorga*, 336 F. Supp. 190 (W.D. Pa.).

[36] *United States* v. *Scully*, 546 F. 2d 255, 262 (C.A. 9); *United States* v. *Turner*, 528 F. 2d 143, 156 (C.A. 9); *United States* v. *Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), affirmed *sub nom. United States* v. *Giordano*, 469 F. 2d 522 (C.A. 4), affirmed, 416 U.S. 505; *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa.), reversed on other grounds *sub nom. United States* v. *Ceraso*, 467 F. 2d 647 (C.A. 3).

[37] *United States* v. *George*, 465 F. 2d 772 (C.A. 6). In that case the monitoring agents testified that they had been instructed to intercept every call and that, accordingly, whenever a call was made "we would automatically turn the machine on." 465 F. 2d at 774. In those circumstances, the court concluded that all interceptions were in violation of the authorizing order and should be suppressed. That conclusion is not inconsistent with our contention in Part I, *supra*, that the reasonableness of the agents conduct depends on an objective assessment of the facts and circumstances known to them at the time. Unless the agents have some reason to believe that every call will be relevant, the use of procedures entailing the automatic interception of every conversation by a machine would preclude a finding that the decision to intercept the entire conversation was based on any facts and circumstances known to the agents at the time. In this case it is undisputed that the interceptions were the product of human decisions made with knowledge of the operative facts—the content and circumstances of

of the illegality.[38] We know of no case holding that the unlawful seizure of evidence requires the suppression of evidence lawfully seized, and several cases have expressly recognized that evidence that is seized beyond the scope of a warrant does not require suppression of evidence seized within its scope. *United States* v. *Dzialak*, 441 F. 2d 212, 216–217 (C.A. 2), certiorari denied, 404 U.S. 883; *Brooks* v. *United States*, 416 F. 2d 1044, 1050 (C.A. 5), certiorari denied *sub nom. Nipp* v. *United States*, 400 U.S. 840; cf. *Stanley* v. *Georgia*, 394 U.S. 557, 570–571 (Stewart J., concurring); *Marron* v. *United States*, 275 U.S. 192. *Sabbath* v. *United States*, 391 U.S. 585, and *Kremens* v. *United States*, 353 U.S. 346, relied on by

the conversations being overheard—that objectively justified the continuation of the interception.

[38] This Court has applied the traditional fruits analysis to several decisions involving interceptions under Title III. Thus in *United States* v. *Donovan*, 429 U.S. 413, in which the application for a judicial authorization failed to identify persons likely to be overheard as required by 18 U.S.C. 2518(1)(b)(iv), the Court held that the statutory violation did not require suppression of the communications intercepted pursuant to the authorization because it was most unlikely that the omission had any effect on the issuance of the order. 429 U.S. at 436. See also *United States* v. *Chavez*, 416 U.S. 562, 574–575; cf. *United States* v. *Giordano*, 416 U.S. 505, 527–528.

In the context of the minimization requirement, the proposition that the improper interception of some communications requires, under the statute, the suppression of properly intercepted communications as well, would lead to the unreasonable result, plainly not contemplated by Congress, that if five out of a thousand communications were unreasonably intercepted, the statute would require the suppression of the 995 that were reasonably intercepted. It is not clear whether petitioners contend for that result. See Br. 33.

petitioners (Br. 32), are not to the contrary; they hold only that where a seizure of evidence is the *result* of some unlawful conduct, it must be suppressed.

We can see no principled basis for applying a different rule to interceptions conducted under Title III. Petitioners argue (Br. 31) that "[s]uppression of only non-pertinent calls could have little, if any, deterrent value. * * * The Government would have nothing to lose and everything to gain in condoning general searches of this nature."[39] While this argument has some superficial plausibility, we submit that it does not withstand analysis. In the first place, the same argument might be made with respect to overbroad conventional searches. If officers arrest an individual and search both within and beyond the area in which a search incident to arrest is permitted, the rule is that items found in the legitimate search-incident area will not be suppressed, although there is thus no disincentive (supplied by the exclusionary rule) to a search of the arrested individual's entire house. The exclusionary rule simply is not administered in such circumstances to extract every ounce of deterrence possible.

Moreover, the exclusionary rule is viewed principally as a means of curbing official excess in pursuit of evidence of crime. To the extent that the minimization requirement is ignored by monitoring agents in

[39] While the government arguably would have little to lose, it is difficult for us to divine what it could possibly have to gain by condoning minimization violations.

the hope that some evidence of crime might unexpectedly be disclosed even from conversations that, objectively viewed, could not reasonably be expected to relate to the investigation, the prospect of suppression would afford a meaningful deterrent. To the extent that the violations of the minimization requirement reflect undisciplined curiosity on the part of the monitoring agents, other statutory remedies are better designed to deal with the problem. Title III contains significant criminal and civil sanctions for violation of its provisions, as well as mechanisms for effectuating those sanctions. 18 U.S.C. 2511(1) makes it a criminal offense, punishable by up to five years' imprisonment, to intercept communications "[e]xcept as otherwise specifically provided in this chapter." In addition Section 2520 affords to any person whose communication was "intercepted * * * in violation of this chapter" a cause of action against any person intercepting the communication, and provides for liquidated damages of not less than $100 per day for each day of violation, punitive damages, and attorney's fees and other litigation costs. While the provision states that "[a] good faith reliance on a court order * * * shall constitute a complete defense to any civil or criminal action * * *," that defense presumably would not be available to agents who act in deliberate defiance of the minimization requirements set forth in authorizing orders.[40] See

[40] Petitioners have never contended that any of the evidence upon which they were convicted derived from intercepted communications that could not, at least objectively viewed, have been properly intercepted; and we submit that the record clearly demonstrates that all of the communications used as evidence were clearly crimi-

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Note, *Minimization: In Search of Standards*, 8 Suffolk L. Rev. 60, 79–80 (1973).

III

PETITIONER SCOTT HAS NO STANDING TO CHALLENGE THE USE AGAINST HIM OF ANY CONVERSATIONS ON THE GROUND THAT THE AGENTS VIOLATED MINIMIZATION REQUIREMENTS WHEN THEY INTERCEPTED CONVERSATIONS TO WHICH HE WAS NOT A PARTY

Throughout this litigation the government has contended that petitioner Scott has no standing to claim that the agents violated the minimization requirements of Judge Smith's orders. The government's contention was based on the position that all of the conversations to which Scott was a party were clearly related to the conspiracy and were reasonable intercepted, and that the only alleged failures to minimize related to conversations to which Scott was not a party, *e.g.*, the conversations between Geneva Jenkins and her mother.

Petitioner Scott, while never contending that he was a party to innocent conversations that could not reasonably have been overheard, has contended that he has standing as a matter of law because some of his conversations were intercepted, relying (Br. 34–36) on the definition of "aggrieved person" in 18 U.S.C. 2510(11) to support that contention. Petitioner Scott's

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nal and interceptable. Accordingly, if the Court disagrees with our contention in Part I that the minimizations requirements were not violated in this case but agrees with our contention that the only communications required to be suppressed are those which were not reasonably intercepted, the judgment below, affirming petitioners' convictions, should be affirmed.

argument fails to distinguish between two different types of standing: "standing" to challenge the use against him of his own intercepted communications on any ground he chooses, and "standing" to assert, as a *basis* for suppressing his own communications, the claim that the agents failed to minimize the interception of communications of other persons and thus improperly invaded the privacy interests of those persons. Petitioner Scott has standing in the former sense, as an "aggrieved person," to complain about the introduction of his own communications on any basis, however unmeritorious. But the nub of the Fourth Amendment standing doctrine, the principles of which also govern Title III cases (see S. Rep. No. 1097, *supra*, at 91, 106; *Alderman* v. *United States*, 394 U.S. 165, 175–176), is that a criminal defendant may not obtain the suppression of evidence against him unless he can show that it was procured by illegal official conduct violating *his* rights. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230; *Alderman* v. *United States*, *supra*, 394 U.S. at 174; *Simmons* v. *United States*, 390 U.S. 377.

Accordingly, the question of petitioner Scott's standing can only be answered by examining whether any illegality that occurred infringed his rights. Under petitioners' broad theory of the case (discussed in Part I(A) of this brief, *supra*), the monitoring agents' alleged improper subjective intent to violate the minimization requirement of the order casts a blanket taint over the entire interception, rendering the interception of every conversation illegal regard-

less of whether there was any duty to minimize with respect to the particular conversation. If this theory were accepted by the Court, Scott would be entitled to suppression of each of his intercepted conversations, since the interception would *ipso facto* have entailed a violation of his rights.[41]

But if the Court does not accept this approach and agrees with our submission that each interception must be judged on its own facts and circumstances for compliance with the minimization requirements, then petitioner Scott would have no standing to raise the claim of the agents' failure to minimize unless he claimed, and advanced some grounds in support, that the agents' failure to minimize resulted in the improper interception of his own communications. In other words, even if the Court found that some of the communications in this case should not have been intercepted, petitioner Scott's conviction should be affirmed.

This is so because the interest that is protected by the statutory minimization requirement is an individ-

[41] Since Petitioner Scott had no interest in the premises of the target telephone and was not identified as a target of the interceptions in Judge Smith's orders (see A. 79–80, 118–120), he would not have standing to challenge the use against him of intercepted communications to which he was not a party. *Alderman* v. *United States*, *supra*, 394 U.S. at 176–180; *United States* v. *Fury*, 554 F. 2d 522, 525–526 (C.A. 2); *United States* v. *Wright*, 524 F. 2d 1100, 1102 (C.A. 2); *United States* v. *Armocida*, 515 F. 2d 29, 35, n. 1 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Poeta*, 455 F. 2d 117, 122 (C.A. 2); see also A. 30–31, n. 5. Since most of the evidence against Scott set forth in the stipulations consisted of communications (and their fruits) to which Scott was a party, his lack of standing in this respect is not significant.

ual's privacy interest in communications that are not relevant to the subject of the investigation and that could not be reasonably intercepted. Since petitioner Scott has never claimed that the interceptions invaded his interests in that respect,[42] he has no standing to raise, as a basis for suppressing his own communications, any failure to minimize the interception of other communications.

The distinction between different types of standing, while implicit in this Court's Fourth Amendment standing decisions, was most clearly presented and articulated in *United States* v. *Lisk*, 522 F. 2d 228 (C.A. 7), certiorari denied, 423 U.S. 1078. There the defendant sought to suppress the use against him of his own bomb, which was seized after police officers unlawfully searched the trunk of an automobile be-

[42] Although petitioners state (Br. 36, n. 22) that "[i]t is not at all clear that Scott was intercepted only in criminal conversations," Scott has never contended otherwise, and the transcripts of his communications belie any such contention. Accordingly, petitioner Scott has failed to meet his burden (see, *e.g.*, *Simmons* v. *United States*, *supra*, 390 U.S. at 389–394) of establishing his standing to challenge, as a ground for suppressing evidence introduced against him, the legality of conduct that affected none of his statutorily protected rights.

Similar grounds may exist for challenging the standing of petitioner Thurmon, assuming that any failure to minimize that existed did not involve any of his conversations. It is true that, as an occupant of the premises where the target telephone was located and as a named target of the investigation, Thurmon has a broader basis for asserting standing than Scott. Nevertheless, the nature of a minimization violation, tied as it is to the agents' conduct with regard to particular conversations, suggests a remedy framed with reference to the violation. The situation is analogous to one in which agents executing a warrant to search a defendant's house

(Continued)

longing to the defendant's friend and found the bomb in plain view. In an opinion by Mr. Justice (then Judge) Stevens, the court recognized a distinction between a search and a seizure, and concluded that while the defendant had standing to object to the seizure (since he owned the bomb), he had no standing to object to the search that led to the seizure, since the search invaded none of the defendant's protected interests. In short, the defendant had no standing to raise, as a ground for suppressing the evidentiary use of the bomb, the claim that someone else's privacy rights were unlawfully invaded by the search that brought the bomb into plain view. See also *United States* v. *Scott*, 520 F. 2d 697, 700, n. 1 (C.A. 9), certiorari denied, 423 U.S. 1056. We submit that the analysis was correct and forecloses petitioner Scott from obtaining suppression on the basis of challenging the lawfulness of the interception of conversations to which he was not a party.[43]

(Continued)

enter without knocking or announcing their purpose, in violation of 18 U.S.C. 3109; in such a case, it would not be the ownership interest in the house that would confer standing to object to the manner of entry, but rather presence on the premises at the time of entry. Since, however, we did not contest petitioner Thurmon's standing in the lower courts, we do not rely on this argument here.

[43] As indicated above (pp. 53–54, *supra*), the standing issue is related to the issue on merits. It is also related to the proper scope of the suppression remedy discussed in Part II of this brief. If the Court agrees with out contention that Section 2518(10)(a) requires only the suppression of communications that should not have been intercepted, petitioner Scott's standing or lack of standing to raise the minimization issue would have no practical significance. His conviction should be affirmed in any event, since he has never contended that his own communications were improperly intercepted. However, if the Court concludes that the improper interception of some communications could require the suppression of all communications, the standing issue would be significant; in that event Scott's lack of standing to raise the issue would nevertheless require affirmance of his conviction, whereas, if he did have standing, his conviction should be reversed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General.

FEBRUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76 - 6767

FRANK RICARDO SCOTT

and

BERNIS LEE THURMON,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

John A. Shorter
508 5th Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

Michael E. Geltner
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

Attorneys for Petitioners

of Counsel:
Christopher M. McMurray
Kenneth D. Polin

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INTRODUCTION

Throughout its brief, the Government has misconstrued Petitioners' arguments, especially in its assertion that Petitioners are promoting a completely subjective test. While this and other misreadings will be clarified, infra, Petitioners wish first to bring to light some parts of the record which the Government has ignored.

Judge Waddy, in the District Court below, concluded that "[t]he admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable." App.39. The Government contests that conclusion by attaching the findings on which that conclusion was based, Gov't Br. 36-39, but has misrepresented those findings.

First, the Government asserts that Finding 4, App. 36, states only that the agents listened to and recorded all calls. Gov't Br. 36. Finding 4 reads as follows:

> 4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

App. 36. Obviously, the court below found it to be more than just a matter of recording all calls and the record supports those findings.[1/]

1/ For instance:

> Q. All right. So what I'm saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics - related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir?
>
> A. Basically, that is correct, sir.

App. 171. See also App. 170-171. The agents recorded all despite the fact that the agents knew of the minimization requirement, as the Government concedes. Gov't Br. 35.

Second, the Government claims that Petitioners and Judge Waddy have misread a portion of Agent Cooper's testimony in which he admits that he and the agents under him took no steps to minimize, except when they accidentally listened to the wrong line.[2/] According to the Government, Agent Cooper really meant to say that no calls were not in fact intercepted, not that the agents never otherwise gave consideration to the minimization requirement of the order. Gov't Br. 37. There is no basis in the record for any such interpretation of this testimony. Throughout both hearings it is clear that both Cooper and Judge Waddy knew the mean-

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2/ Gov't Br. 36-37. The testimony, found in Judge Waddy's Finding No. 10, App. 37 and pp. 680-681 of the 1974 hearing transcripts, reads as follows:

> BY THE COURT:
> Q Agent Cooper, at a hearing-at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?
> A. That is correct, Your Honor.
> Q. And also that there were times when you, yourself, did the listening?
> A. That's correct.
> Q. The question I wish to ask you is this, whether at any time during the course of the wiretap-of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?
> A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtain the reception of conversations was in that instance where the line was connected to-misconnected from the correct line and connected to an improper line. We discontinued at that time.
> Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?
> A. That is correct, Your Honor.

ing of minimization."[3/]

Finally, the Government's brief boldly states that "[t]he record affords no basis for concluding that the agents proceeded in bad faith..." On the contrary, the record is replete with indications of bad faith. See Findings 3,4,9,10 and 13, App. 36-38. See also note 11, supra. As the Government concedes, Gov't Br. 35, the agents knew of the minimization requirement. They also analized 60% of the calls as non crime-related, yet never took steps to cut off the wiretap. App. 36 (finding); 175 (testimony of Cooper). That is bad faith.

I. SECTION 2518(5) OF TITLE III MANDATES THAT NARCOTICS AGENTS MAKE GOOD FAITH EFFORTS TO MINIMIZE THE INTERCEPTION OF INNOCENT CONVERSATIONS AND THAT SUCH EFFORTS BE REASONABLE UNDER THE CIRCUMSTANCES THE AGENTS REASONABLY PERCEIVE AT THE TIME OF THE WIRETAP.

The Government incorrectly reads Petitioners' argument as suggesting the agents "...violated the statute and the orders because they subjectively intended to intercept every call without regard to the minimization requirements..." (Respn. Br., p.16)[4/].

3/ The Government accuses Judge Waddy of using "minimization to mean non-interception," stating that the two concepts are in fact quite different. Gov't Br. 27 n.25. To show the Court's confusion, it cites to pp. 680-81 of the 1974 transcripts--precisely the passage that the Government says has been misinterpreted. Id. Below, it conceded no minimization. App. 45 (Scott II)

4/ Throughout its brief, the Government construes subjective intent as solely referring to the agents' predisposition or state of mind in relation to minimization. As noted below, however, a correct analysis requires subjective inquiry into what the agents reasonably believed and how they acted on their reasonable beliefs, rather than a retrospective assessment of how others might analize the telephone logs.

Furthermore, the Government ardently contends that the appropriate inquiry is not subjective motives, but, as suggested by the court below, "an objective assessment of the facts confronting the police at the time" of the intercepts (Respn. Br. p. 15). Petitioners contend, however, that the monitoring agents must make good faith efforts to minimize unnecessary intrusions in the conduct of the wiretap. Section 2518(5) requires no less,[5/] and the lower courts have uniformly so held.[6/] Absent good faith efforts at compliance with minimization requirements, it is impossible to assess the objective reasonableness of the agents' conduct.[7/] The concession by the Government in this case that the agents made no "effort[s] to shut off any telephone conversations" demonstrates the agents significant disregard for privacy concerns. (1974 tr., pp. 103-103,687).[8/] This alone violates the

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5/ To limit unreasonable intrusions on privacy, Title III regulates police conduct and requires affirmative actions by agents, including, inter alia, minimization and reports to supervising judges. See Petitioners Br., pp. 20-23; United States v. Turner, 528 F.2nd 143, 156 (9th Cir. 1975) (Statute affirmatively requires that measures be adopted to reduce improper interceptions to a practical minimum).

6/ The federal courts are acutely aware of Congressional concern with the serious ramifications of electronic surveillance and its propensity to turn into a general search. Thus the courts have formulated a two-prong inquiry to test minimization; whether the agents made good faith efforts to minimize and whether these efforts were reasonable under the circumstnaces. United States v. Tortorello, 480 F.2nd 764, 784 (2nd Cir., cert denied, 414 U.S. 866 (1973); The courts either explicitly refer to the agents good faith efforts or proceed directly to the reasonableness of those efforts. See, e.g., United States v. Clerkley, 556 F.2nd 709, 718 (4th Cir. 1977) (court more willing to find good faith attempt at minimization when supervising judge requires reports); United States v. James, 494 F.2nd 1007, 1019 (D.C. Cir.), (examine certain factors to determine degree of minimization required in a given case), cert. denied, 419 U.S. 1020 (1974); United States v. Manfredi, 488 F.2nd 588, 600 (2nd Cir. 1973), (methods used to effect minimization must be in good faith and reasonable), cert. denied 417 U.S. 936 (1974).

7/ Of course, cases will arise where it is reasonable for agents to implement few minimization techniques. Yet, agent readiness to do so is a prerequisite to a reasonableness finding.

8/ And the district court so found. See (Pet. Br., p. 25) (App. 28).

requirements of Title III and section 2518(5).[9]

In testing the reasonableness of each interception under the circumstances, the Government ultimately relies upon the call analysis, which it contends is based "not upon what the interceptions ultimately disclosed, but upon the reasonableness of the act of listening in view of the nature of the conversations being overheard." (Respon. Br., p. 25) Petitioners' response is twofold: first, as emphasized in our main brief, the call analysis was prepared in entirety by an United States Attorney after-the-fact, see (Pet. Br., pp. 24-25) and thus reflects only his perceptions and not those of the monitoring agents; Secondly, the call analysis involved terminology and categories that were not indicative of the agents' thinking or information. (1974 tr., p. 143, 332-34).[10] The call analysis thus fails to test the objective reasonableness of the agents' assessment of the facts confronting them at the time of the wiretap.[11]

9/ Because of Title III's unique provisions establishing affirmative police duties, the Government's discussion of search and seizure law is large superfluous. See (Respn. Br. pp. 19-23). No efforts to minimize makes the wiretap tantamount to the general search condemned by this Court in Berger v. New York, 388 U.S. 41 (1967).

10/ The cited testimony was relied upon by Judge Waddy in assessing the call analysis and clarifies Petitioners' statement that "the district court found the call analysis contained errors of characterization and factual inaccuracies and did not represent information known to the agents at the time of interception." (Pets. Br. pp. 25-26); See (A-38); (Respn. Br. p.30)

11/ Kellogg, the call analysis author, testified that it was not "an effort to infer or assert that the agents followed these relatively sophisticated delineations in the course of the intercept." (1974 tr. p. 436). A retrospective call analysis can only be used as circumstantial evidence from which the agents' compliance at the time can be inferred. The inference here is refuted by testimony that no efforts were made to minimize intrusions. (1974 tr., pp. 103-04, 687).

The Government's discussion of whether "the agents entertained a subjective intent...to disregard the minimization requirements ..." also misreads the focus of Petitioners' arguments. (Respn Br. p. 26) As noted above, Petitioners do not allege the agents were predisposed or intended to violate the statute, but rather that no effort was made to comply with its minimization requirements. The uncontradicted testimony of Agent Cooper demonstrates that the agents made no effort to minimize as a discretionary matter, (A. 126), and the Government attorneys, as well as the court below have so recognized: "Throughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations. Thus its position has of necessity been that interception of all 384 conversations was reasonable under the facts of this case." (footnote omitted) United States vs. Scott II, supra. (A.45).

The Government lists several factors to demonstrate the reasonableness of the individual interceptions in the instant case.[12] (Resp. Br. pp. 33-35). Petitioners' wish to clarify their position on several points. First, the fact that the agents found the scope of the conspiracy considerably smaller than anticipated does not relate solely to geographic considerations, but, more importantly, to the agents' need to obtain additional evidence on the local conspirators. The Government's applications

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__/ The Gov't analysis, of course, concentrates on the validity of the interceptions, rather than, as the lower courts uniformly have, on the reasonableness of the agents' minimization efforts. See, e.g., United States vs. Quintana, 508 F.2nd 867, 874 (7th Cir. 1975) (court delineates several factors relevant to whether the government has done all it could to avoid unnecessary intrusion); United States vs. Kirk, 534 F.2nd 1262, 1275 (8th Cir. 1975) (same); United States vs. Armocida, 515 F.2nd 29,44 (3rd Cir.) (factors must be considered in any review of minimization) cert denied, 423 U.S. 858 (1975); see (Pets Br. pp. 27-29)

requesting wiretap orders demonstrate that the main local conspirators were known prior to commencement of the taps. (App. 65,84,100). Ultimately, only fourteen individuals were charged with narcotics offenses in two indictments and of those, eight were customers who bought from a supplier and his two assistants, i.e. Scott, Thurmon, Lee, all known prior to the wiretaps. Thus, as the narrow scope of the conspiracy became apparent to the monitoring agents, minimization efforts should have started. Secondly, as noted in our main brief, the reports to Judge Smith reveal that the agents understood the code language used by the conspirators. Yet, the Government continues to argue the importance of code language in their brief. (Respon. Br., pp. 33-34). Agent Cooper's testimony, however, firmly establishes that the agents were well versed in the code language and were not handicapped by it. (1974 tr., pp. 75-76, 170).[13/]

13/ Agent Cooper testified that "[the monitoring agents] had at least a year's experience and were aware of the code of language that was being used." (1974 tr. p. 170). Furthermore these experienced agents classified only 40% of the intercepted calls as narcotics related in their reports to Judge Smith. See (Pet. Br. pp. 25,28). The implementation of techniques to limit intrusions were thus particularly appropriate.

II. A SEARCH WITHOUT ANY ATTEMPT TO MINIMIZE IS A GENERAL SEARCH, REQUIRING THE SUPPRESSION OF ALL EVIDENCE SEIZED.

The Government contends that, at worst, only some calls were improperly intercepted and dismisses as "extreme" Petitioners' argument that the intercepting agents' complete failure to attempt to minimize renders the entire intercept invalid. Gov't Br. 46. The Government then proceeds to analogize to physical search and seizure situations where agents, initially searching within permissible bounds, stray beyond them Gov't Br. It concludes that only that evidence seized when one strays beyond the permissible bounds is suppressible. Gov't Br. 47-49.

Petitioners would agree with the analogy and the resulting conclusion were it not for the fact that it is irrelevant to any interception conducted in the manner that this one was. An electronic interception is distinct in its scope, conduct and the extent of the invasion of privacy from a physical search. Pet. Br. 32-33 Electronic eavesdropping requires more care than a physical search and seizure due to the much greater opportunity to intercept non-crime related information. When conducted without any attempt to minimize it constitutes a general search. Berger v. New York, 388 U.S. 41 (1967) The framers of the Constitution did not deem it to too "extreme" to condemn general searches. Nor has this Court found it "extreme" to remedy illegal general searches by suppressing all of the evidence gained by that search. Berger vs. New York, supra. This Court has long recognized the great danger to freedom that general searches cause. In Boyd vs. United States, 116 U.S. 616 (1886), the court found unconstitutional a statute that would have had the effect of a general search. It relied on the famous English case of Entick vs. Carrington, 19 How. St. Tr. 1029 (1765) in which Lord Camden first underscored how general searches subvert a free society.

The Government concedes that evidence seized as a result of unlawful conduct must be suppressed. Gov't Br. 50 An interception without any attempt to minimize throughout the course of the operation is, by its nature, a general search and is illegal from its inception. Since the entire interception is illegal, all evidence gained from it must be suppressed, regardless of its alleged connection to criminal activity.[14/]

III. BECAUSE THE INTERCEPTION WAS FAULTY IN ITS ENTIRETY, PETITIONER SCOTT HAS STANDING TO SUPPRESS HIS INTERCEPTED CALLS.

The Government asserts that Petitioner Scott should have no standing in this matter because of his intercepted calls were allegedly crime-related. Gov't Br. 52-56 This distinction is meaningless, however, when the entire intercept is unlawful. Since every conversation was intercepted in violation of Judge Smith's order, petitioner Scott must have standing under 18 U. S.C. 2510(11) and 18 U.S.C. 2518(10)(a)(iii). The Government's brief also creates a distinction between standing to suppress his own conversations on any ground he chooses and standing to suppress based on the improperly intercepted calls of other persons. Gov't Br. 52-53. But the latter distinction is unnecessary. A general search taints the interception of every call, and Scott's calls were just as improperly intercepted as everyone else's. Therefore as an aggrieved person whose calls were improperly intercepted, he has standing to suppress his intercepted calls.

14/ The Government queries what it could possibly gain from minimization violations. Gov't Br. 5 n.39 The answers, in one word is evidence.

CONCLUSION

The judgments below should be reversed.

Respectfully Submitted,

John A. Shorter
508 5th Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

Michael E. Geltner
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached copy was mailed on February 21, 1978, to:

Solicitor General of
the United States
Department of Justice
Washington, D.C. 20350

Michael E. Geltner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-6767

FRANK R. SCOTT and BERNIS L. THURMON,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CHLOE V. DAVIAGE AS AMICUS CURIAE

Peter S. Smith
Adrienne E. Volenik

Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201

Counsel for Amicus Curiae

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BRIEF FOR CHLOE V. DAVIAGE AS AMICUS CURIAE

INTEREST OF CHLOE V. DAVIAGE

On June 24, 1970, a District of Columbia Grand Jury handed down indictments charging amicus Chloe Daviage and petitioners Frank Scott and Bernis Thurmon with violations of federal narcotics laws. For the next seven years, Daviage, as a direct party to the proceedings, vigorously asserted her rights in extensive pre-trial hearings, the trial itself, three decisions of the court of appeals, and two petitions for writ of certiorari. Although this Court granted the joint petition for writ of certiorari filed by Scott and Thurmon (No. 76-6767), it has not acted on Daviage's petition (NO. 76-6637).[1]

This Court's review of Scott's and Thurmon's claims involves consideration of the identical court of appeals opinion and judgment to which Daviage was a party below and from which she filed a separate and timely petition for writ of certiorari. Hence, any action the Court takes in the instant case will apply to Daviage, not simply as precedent but because she is a party to the judgment of the court of appeals which this Court will reverse, affirm or vacate.

1. The legal issues in Scott's and Daviage's cases are identical. The Thurmon case is different only insofar as the Government is not contending that he lacks standing to raising minimization claims.

In a letter to the Clerk of this Court, dated October 14, 1977, counsel for Daviage pointed out that his client was placed in the position of having her case determined solely by the actions of counsel for her co-petitioners. The letter also noted that because this Court had not ruled on Daviage's petition to proceed in forma pauperis, she would be unable to file an amicus curiae brief due to the cost of printing. On October 17, the Clerk telephoned counsel for Daviage and stated that she would not be required to comply with the requirement of Rule 42.5, of the Revised Rules of this Court that an amicus curiae brief be printed.

In a letter dated October 25, 1977, counsel for petitioners Scott and Thurmon consented to Daviage's participation as amicus curiae. In a letter dated November 4, 1977, the Solicitor General gave his consent. Those letters have been filed with the Clerk of this Court.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit, filed on March 29, 1977, is unreported. The text of the opinion is set forth in the Joint Appendix. No opinion was rendered by the United States District Court for the District of Columbia upon the conviction of the petitioners and the amicus.

Other opinions in this case prior to the conviction of the petitioners and the amicus are as follows: The first opinion of the United States District Court for the District of Columbia, granting the joint motion to suppress evidence, is reported at 311 F.Supp. 233 (D.D.C. 1971). The opinion of the United States Court of Appeals for the District of Columbia Circuit upon the Government's first interlocutory appeal is reported at 504 F.2d 194 (D.C.Cir. 1974). The second opinion of the district court, again granting the renewed suppression motion, is unreported. The text of the opinion is set forth in the Joint Appendix and in the Addendum to this Brief. The opinion of the court of appeals upon the Government's second interlocutory appeal is reported at 516 F.2d 751 (D.C.Cir. 1975). The order of the court of appeals denying a

suggestion for rehearing en banc of the Government's second interlocutory appeal, and the statement of Circuit Judge Robinson are reported at 522 F.2d 1333 (D.C.Cir. 1975). The order of this Court denying the petition for writ of certiorari to review the court of appeals' opinion on the second interlocutory appeal, and the dissenting opinion of Mr. Justice Brennan are reported at 425 U.S. 917 (1976).

JURISDICTION

The Memorandum and Judgment of the Court of Appeals for the District of Columbia Circuit were filed on March 29, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution - Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code - 18 U.S.C. § 2510(11) (1970)

As used in this chapter -

> (11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

United States Code - 18 U.S.C. § 2515 (1970)

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

United States Code - 18 U.S.C. § 2518(5) (1970)

> (5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept

> shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

United States Code - 18 U.S.C. § 2518(10)(a) (1970)

> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

QUESTIONS PRESENTED

1. Do parties to telephone conversations intercepted pursuant to a wiretap order have standing under 18 U.S.C. § 2518(10)(a) to move to suppress the communications seized in deliberate violation of the minimization directives contained in that wiretap order?

2. Did the court of appeals err in concluding that federal narcotics agents, in executing a wiretap, complied with the provision of the intercept order which, pursuant to 18 U.S.C. § 2518(5), required the agents to minimize the interception of non-pertinent conversations, even though the agents conducted round-the-clock surveillance, monitored each and every communication, and admittedly made no good faith effort to comply?

3. Is suppression of the entire intercept and any evidence derived therefrom required because the executing agents totally disregard and flagrantly violated the wiretap order which, pursuant to 18 U.S.C. § 2518(5), directed them to minimize the inter-

ception of non-pertinent conversations?

STATEMENT

Petitioners Frank Scott and Bernis Thurmon, and amicus curiae Chloe Daviage were indicted in the United States District Court for the District of Columbia on June 24, 1970, on four counts of alleged violations of federal narcotics laws. The charges resulted from evidence obtained through the use of wiretap intercepts conducted by the Government, pursuant to 18 U.S.C. § 2518, from January 24 to February 24, 1970.

On April 29, 1971, the district court granted defense motions to suppress all wiretap evidence because of the Government's failure to comply with the requirement, contained in both § 2518 and the Order authorizing the wiretap, that its agents minimize the interception of non-pertinent conversations. The court relied upon testimony to the effect that sixty percent of the conversations did not involve narcotics, and found no evidence that the executing agents made any attempt to comply with the minimization requirement. The court held that to allow continued monitoring when the intercepted communications are clearly non-narcotic related would render the minimization requirements of the statute nugatory and violate the principles of Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967). The court also found that the application for an order authorizing the wiretap and the supporting affidavit were sufficient to satisfy the requirements of the statute. United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971).

On May 26, 1971, the Government moved for reconsideration by the district court of its order. It presented an analysis prepared by the United States attorney, fourteen months after the actual surveillance, in which the intercepted calls were categorized and a conclusion presented that only two percent of the calls were unreasonably intercepted. The court denied the motion on June 29, 1971.

The Government filed an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit on June 23, 1971. On June 27, 1974, the court of appeals issued its

opinion, finding that all the defendants had standing to raise a minimization claim. The court further held, however, that the trial court had applied an improper standard in assessing the merits of the minimization issue, and that the issue must be determined by the standard indicated in its decision in United States v. James, 494 F.2d 1007 (D.C.Cir. 1974). The court of appeals found the record insufficient to apply the James standard, and remanded for further hearing, particularly with regard to the analysis by the United States attorney of the intercepted calls submitted by the Government in support of its motion for reconsideration in the district court in 1971. United States v. Scott, 504 F.2d 194 (D.C.Cir. 1974) (hereinafter referred to as "Scott I").

Hearings on the minimization issue were held in the district court between October 15 and November 8, 1974. The court found, inter alia, that the monitoring agents made no attempt to comply with the minimization provision of the wiretap order, and that the only time the agents even considered minimization occurred when they mistakenly tapped into the wrong line. Based on the admitted failure by the monitoring agents even to attempt compliance, the court again suppressed the wiretap evidence and entered an order to that effect on November 17, 1974. See Joint Appendix, and the Addendum to this Brief.

The Government took a second interlocutory appeal on December 3, 1974. The case was argued before the court of appeals on April 23, 1975. On July 25, 1975, that court rendered its opinion, ruling that even if sixty percent of the calls were non-narcotic related and that the agents made no attempt to minimize the interception of innocent conversations, it could find no instance where the agents' conduct in intercepting conversations was unreasonable. Pursuant to United States v. James, supra, it reversed the lower court's suppression order. The court went on to note that had the district court been correct in its ruling that the minimization requirement had been breached, total suppression of the evidence would not appear to be the proper remedy, and suggested that only conversations which were non-narcotic related be suppressed. United States v. Scott, 516 F.2d 751 (D.C.

Cir. 1975) (hereinafter referred to as "Scott II").

On August 8, 1975, Scott, Thurmon, and Daviage petitioned the court of appeals for a rehearing en banc. On October 3, 1975, the court of appeals denied the request, four judges dissenting. United States v. Scott, 522 F.2d 1333 (D.C. Cir. 1975).

On November 3, 1975 Scott, Thurmon,and Daviage petitioned the Supreme Court for a writ of certiorari. On April 5, the petition was denied with three justices dissenting. Scott v. United States, 425 U.S. 917 (1976).

The case was then remanded for trial, pursuant to Scott II. On July 6, 1976, motions on behalf of all defendants for dismissal of the indictments on speedy trial grounds were denied. On July 15, 1976, Scott, Thurmon, and Daviage were tried on a stipulation of facts and all were found guilty of violating one or more provisions of the federal narcotics laws. Scott and Thurmon were each sentenced to ten years' imprisonment. The trial court, noting that Daviage's participation in the offenses was only peripheral,[2] sentenced her to three years' imprisonment, suspending all but six months.

The defendants filed notices of appeal to the court of appeals, in which they claimed that they were denied the constitutional right to a speedy trial. They also preserved for review in this Court the minimization issue.

The case was argued on March 21, 1977. On March 29, 1977 the court of appeals filed a memorandum opinion denying all of the contentions.

On April 22, 1977, Daviage petitioned this Court for a writ of certiorari. On May 19, Scott and Thurmon filed a joint petition for writ of certiorari. Both petitions raised the minimization and speedy trial issues. On October 11, 1977, Scott's and Thurmon's petition was granted, limited to the statutory minimization issue. The Court further directed the parties to brief and argue the question of standing. 46 U.S.L.W. 3238 (1977). Daviage's petition is still pending.

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2. Daviage was found guilty only of one count of using a telephone to facilitate the purchase of narcotics.

SUMMARY OF ARGUMENT

I. Standing of the parties in this case to raise the minimization claim is conferred by the plain meaning of the statute in that a party to an intercepted communication is an "aggrieved person" and, as such, is entitled to invoke the suppression sanction of 18 U.S.C. § 2515. The fact that Scott and Daviage, were not subscribers to the tapped telephone is irrelevant. Although the intercepted calls in which Scott and Daviage participated were exclusively inculpatory, this fact also makes no difference in determining standing. To the extent that the nature of the intercepted calls is relevant at all, that factor only serves as one kind of evidence in demonstrating a failure to minimize. Moreover, such a construction requires no expansion of the current law of standing. Recent case law reflects this Court's concern with protecting privacy rights and insuring that those who fall victim to official intrusion can seek redress.

II. Although this Court has not yet given workable criteria to the minimization requirement, a discernible standard has developed in the federal courts. This standard requires that, to satisfy the directive of 18 U.S.C. § 2518(5), (1) the agents must make good faith attempts to minimize the interception of nonpertinent conversations, and (2) the attempts to minimize must be reasonable. This two-prong standard, widely adopted by the courts, implements the approach of the drafters of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in balancing the competing values of law enforcement and privacy. It further seeks to mitigate the problems of hindsight evaluations of reasonableness. The record in this case manifests the flagrant violation and purposeful disregard of the minimization requirement by the agents who conducted the surveillance. The admitted failure even to attempt to minimize precludes a finding of compliance with § 2518(5), and requires reversal of the case. However, should this Court find the good faith test inapplicable and seek to determine whether the actual minimization accomplished was reasonable, it is equally clear that, under the circumstances, 100% interception was unreasonable. Given the relatively small

scope of the criminal enterprise, the residential nature of the tapped telephone, the development of patterns of unrelated communications, and the inadequate judicial supervision, a substantial degree of minimization was required. Absent even the attempt at minimization, § 2518(5) was clearly violated.

III. Should this Court determine that the Government violated the minimization requirement, the appropriate remedy is suppression of the entire intercept. The statutory suppression remedy provided for in § 2515 directs a court to suppress intercepted communications and any evidence derived therefrom where the interception was not made in conformity with the order of authorization or approval. Confining suppression to those calls which fall outside the scope of the warrant, as the Government seems to suggest, is essentially no remedy since, unlike a tranditional search, the improper items (i.e. conversations) seized will be innocent or at least irrelevant to the criminal matter which is the subject of the wiretap. To suppress only non-pertinent communications is to discredit the centrally important function of § 2518(5), which is to insure that electronic surveillance is conducted pursuant to the directives of Berger and Katz.

Whether the remedy of exclusion of evidence taken in violation of minimization requirements is confined to cases where no good faith efforts were taken to implement any plan for minimization, or whether the remedy may be applied more broadly to cases where the violation is the failure to take adequate steps to minimize, exclusion is required in this case because the monitoring agents totally and deliberately disregarded the minimization requirement.

I. DAVIAGE AND SCOTT, AS PARTIES TO INTERCEPTED TELEPHONE CALLS, HAVE STANDING TO MOVE TO SUPPRESS COMMUNICATIONS SEIZED IN VIOLATION OF THE WIRETAP ORDER.

Daviage and Scott have standing to request suppression of the wiretap evidence in the instant case. The plain language of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), (hereinafter referred to as "Title III"), and the relevant decisions of this Court and other federal courts support this position. Their position is grounded on the fact that 1) they were parties to intercepted conversations, and 2) the agents executing the wiretap did not adhere to the minimization requirement contained in the wiretap order.[3] According to the terms of Title III itself, these two factors trigger the standing provisions outlined in the statute.

Section 2518(10)(a) of Title III sets forth the statutory requirements for standing to request suppression. It states in pertinent part:

> Any aggrieved person in any trial...may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that - -
>
> ***
>
> (iii) the interception was not made in conformity with the order of authorization or approval.[4]

An "aggrieved person" is defined in § 2510(11) as

> a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

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3. Section 2518(5) states, in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be...conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter....

4. The entire text of § 2518(10)(a) is set forth, supra, at p.4.

In the instant case, Daviage and Scott were parties to intercepted telephone communications; indeed, the wiretaps were the sole evidence against them. Upon hearing the initial motions to suppress, the trial court rejected the Government's contention that they lacked standing to raise the minimization issue. See United States v. Scott, 331 F.Supp. 233 (D.D.C. 1971).[5] At the first interlocutory appeal, the Government pressed its standing argument. See Scott I, 504 F.2d 194 (D.C.Cir. 1974). The court of appeals, resting its decision entirely upon the plain language of §§ 2510(11) and 2518(10)(a), correctly rejected the Government's claim, ruling that all of the defendants satisfied the requirements as stated in Title III:

> There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute. As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interceptions of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order or approval." 18 U.S.C. § 2518(10)(a)(iii). 504 F.2d at 197 (footnote omitted).

It is not disputed that Scott, Thurmon, and Daviage were parties to intercepted telephone communications. Yet despite the unequivocal language of § 2518(10)(a), conferring upon such persons the right to move for suppression of the interceptions that did not conform to the wiretap order, the Government continues to urge that Scott and Daviage lack standing.[6]

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5. Explicit reference to the trial court's determination that all the defendants had standing to raise the minimization issue is found in the first court of appeals decision. Scott I, 504 F.2d 194 (D.C.Cir. 1974). In that opinion, the court stated in reference to the standing issue:

> Although the opinion does not so indicate, the transcript of the hearings reveals that the Government unsuccessfully pressed this argument upon the District Court. Id. at 197 n.6.

6. The Government bases its argument on the notion that, since the intercepted calls in which Daviage and Scott participated were related to the purpose of the wiretap, they were not injured. See Scott I, 504 F.2d at 197; Brief for the United States in Opposition to the Petitions For Writ of Certiorari, Scott, et al. v. United States, in Nos. 76-6637 and 76-6767 (Supreme Court of the United States, Oct. Term, 1977), (hereinafter "Government's Brief in Opposition") at 6-7. Of course, such a contention rests squarely on the nature of the calls "seized" and runs directly counter to established fourth amendment principles. See discussion, infra, at pp. 21-24.

This Court has previously determined that Title III should be strictly construed to implement the clear language of the statute itself and the underlying congressional intent to limit electronic surveillance. In United States v. Giordano, 416 U.S. 505 (1974), the Court interpreted § 2516(1) of Title III. Mr. Justice White, speaking for a unanimous Court, stressed that

> Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. 416 U.S. at 515.

Giordano involved the Government's attempt to broaden § 2516(1) to permit the Attorney General to delegate his power to authorize interceptions to his administrative assistant instead of to an authorized Assistant Attorney General. The Court refused to accept an interpretation of § 2516(1) which would not only ease the ability of the Government to seek warrants (thereby violating the Congressional intent behind Title III) but also was clearly not warranted by the plain words of the statute.

In United States v. Kahn, 415 U.S. 143 (1974), the Court construed the language of § 2518(1)(b)(iv) which requires the wiretap applicant to state "the identity of the person, if known, committing the offense and whose communications are to be intercepted." The Kahns unsuccessfully argued that this language should be interpreted to mean the applicant must name all possible people whose communications may be intercepted. 415 U.S. at 152. Mr. Justice Stewart, speaking for the Court, stressed that in resolving the sometimes contrary considerations of law enforcement with the need for individual privacy, it was important to begin with "the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151. The Court held, therefore, that since § 2518(1)(b)(iv) stated two requirements-- identification of the person

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(fn.6 cont'd.)

committing the offense and of the person whose conversations were to be intercepted; hence, the government agents were not required to name those whom they did not yet know to be committing the offense.

The message of Giordano and Kahn is clear: the detailed provisions of Title III should be precisely implemented. These cases further suggest that, should interpretation be necessary, any ambiguities should be construed in favor of limiting the government's surveillance authority and showing a high regard for individual privacy. See United States v. Giordano, 416 U.S. at 515.

A finding that Daviage and Scott are aggrieved persons and have standing is also consistent with the general purpose of Title III and fourth amendment standing principles. The legislative history of § 2510(11), itself, is not particularly revealing. The portion of the Senate committee report which amplifies the definition of "aggrieved person", says simply:

> This definition defines the class of those who are entitled to invoke the suppression sanction of section 2515 discussed below, through the motion to suppress provided for by section 2518(10)(a), also discussed below. It is intended to reflect existing law. S. Rep. No. 1097, 90th Cong. 2nd Sess. 91, reprinted in 1968 U.S. Code Cong. & Ad. News, at 2179-80. (emphasis supplied).

The legislative history of §§ 2515 and 2518(10)(a), while shedding light on those particular sections, does not add meaning to the definition of "aggrieved person." See S. Rep. No. 1097, supra, 96,106 reprinted in 1968 U.S. Code Cong. & Ad. News at 2184-85, 2195.[7]

However, an examination of the total legislative history of Title III does reveal that permitting one in Daviage's or Scott's position to raise standing is consonant with the general thrust of Title III to show a high regard for individual privacy. The legislative history establishes that the purpose of Title III is twofold: (1) to protect the privacy of wire and oral communications and (2) to delineate the precise circumstances under which certain limited interception may be warranted. See S. Rep. No. 1097, 90th

7. There is nothing in the legislative history of these sections which suggests that persons in the position of Daviage and Scott do not have standing. See United States v. Best, 363 F.Supp. 11, 17 (S.D.Ga. 1973), in which the court held that as long as the defendants moving to suppress wiretap evidence had been parties to some of the interceptions, they had standing.

Cong., 2nd Sess. 66, reprinted in 1968 U.S.Code Cong. & Ad. News, at 2153. The Senate Report also states:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Id. at 67 reprinted in 1968 U.S.Code Cong. & Ad. News at 2154.

Title III is explicitly constructed to protect the privacy interests of individuals from electronic invasion. The policy of protecting privacy is further stated in the commentary accompanying § 2515.[8] In speaking of this section, the Senate Report states:

> The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communication. Id. at 96, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185.

Thus, while Title III seeks to employ limited electronic surveillance against certain kinds of organized crime, at the same time a premium is placed on respect for the privacy interests of the citizenry. The protection of privacy was stressed by the Court in Gelbard v. United States, 408 U.S. 41 (1972). The Court stated that the underlying policy of the wire tapping provisions of Title III is "strictly to limit the employment of those techniques of acquiring information." Id. at 47. In order to implement that policy,

> Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. Id. at 46.

The policy of limiting electronic surveillance, then, is clear both from the legislative history and from the Court's own interpretation of that history. The question of standing must be analyzed

8. Section 2515, discussed in detail, infra, at pp.56-59 the evidentiary sanction by prohibiting the use as evidence of wire or oral communications intercepted in violation of Title III. The full text of § 2515 is set forth supra, at p.3.

with an awareness that the congressional policy underlying Title III recognizes the obtrusiveness of electronic surveillance. The standing provisions, therefore, were drafted with the understanding that the potential for invasion of privacy was great. So, while not intending to expand existing law, Congress did intend to insure that those persons whose privacy was invaded would be in a position to assert the proper statutory remedy.

An examination of existing fourth amendment standing doctrine, which Title III's standing requirements were meant to reflect,[9] reveals further support for Daviage's and Scott's position. In Jones v. United States, 362 U.S. 257, (1960), this Court discussed standing under Rule 41(e), Fed. R. Crim. P. Jones discussed the dilemma facing a defendant charged with a crime of which possession is a key element. In such a situation, a defendant admitting his possession for the purpose of establishing standing to move to suppress the item would also necessarily be admitting to one of the key elements of the substantive crime. The Court determined that requiring a defendant to make this Hobson's choice violated the purpose behind Rule 41(e). Mr. Justice Frankfurter, speaking for the Court, said that the search and seizure restrictions were "designed for protection against official invasion of privacy," and that an "aggrieved person" is one who "belongs to the class for whose sake the Constitutional protection is given." 362 U.S. at 261, quoting New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907). Indeed, as the Court pointed out, the very purpose behind judicial refusal to view evidence gathered in violation of the fourth amendment is to make "effective the protection of privacy." Id. at 261.

The Jones case developed the rule that "anyone legitimately on premises where a search occurs may challenge its legality...."[10] 362 U.S. at 267. This rule sweeps aside subtle distinctions of the common law of property as the basis for determining standing, and

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9. See the legislative history quoted, supra at pp. 13-14

10. In Jones, the Court held that the petitioner had standing under 41(e) to raise the legality of a search of an apartment in which he was only occasionally a guest.

indicates the Court's concern with insuring that those whose constitutionally protected privacy rights fall victim to official intrusion can seek redress. Mr. Justice Frankfurter further stated, with specific reference to "aggrieved person" status, that

> we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. Id. at 264.

In Alderman v. United States, 394 U.S. 165 (1969), this Court further elaborated on standing to raise a fourth amendment violation:

> In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations. Id. at 176 (emphasis supplied).

The Alderman Court explicitly kept its holding within the bounds of fourth amendment standing doctrine. See Id. at 175-76.[11] However, by its very terms --"if the conversation of a petitioner were overheard"-- the Alderman Court makes crystal clear that Daviage and Scott would have had standing under pre-Title III law.[12]

II. Indeed, the decision refers to the then proposed Title III legislation as support for the notion that either Congress or the state legislatures could expand constitutional standing doctrine, but that the proposed Title III did not do so. Id. at 175 n.9.

12. In Berger v. New York, 388 U.S. 41 (1967), this Court held that the petitioner had standing to challenge the New York State electronic surveillance statute even though his conversations were only overheard during the bugging of someone else's office. The Berger Court stated:

> Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider...the standing of petitioner to attack the search and seizure made thereunder. Id. at 55.

Berger was one of the primary opinions used by the drafters in constructing Title III. The narrow proscriptions of both Berger and Katz, 389 U.S. 347 (1967), were explicitly built into Title III:

> In the course of the opinion [Berger v. New York], the Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards and to conform with Katz v. United States, 389 U.S. 347 (1967). S.Rep. No. 1097, supra, 66, reprinted in 1968 U.S.Code Cong. & Ad. News, at 2153.

The Alderman case, unlike the instant one, involved the surreptitious placement of a "bug". However, the pre-Title III standing rule was no different when the device used to obtain information was a wiretap. This fact was made clear in Katz v. United States, 389 U.S. 347 (1967), where the Court, after noting that the fourth amendment covered electronic interceptions, went on to state that one who uses a telephone

> is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. Id. at 352.

The thrust of Jones, Alderman, and Katz is that standing doctrine is designed to afford persons whose conversations have been overheard a means of challenging the validity of the interceptions. Those cases indicate that "[p]rivate conversations...a at the core of the area in which individuals may have reasonable expectations of privacy". United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823 (1976) (footnote omitted). This policy has been articulated in several lower federal court decisions relating specifically to minimization. In United States v. King, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974), the court addressed the issue of standing to raise minimization. Concluding that one of the defendants, Maack, was an "aggrieved person" with standing to raise minimization, the court said:

> On at least one occasion a message sent at his direction and a reply thereto were intercepted by Government agents. His privacy was thus invaded to the same extent as if he had taken the phone in hand and spoken on the line himself. Id. at 506.

The circumstances of King are certainly more attenuated than those in the instant case. While Maack had relayed at least one message through someone else, Daviage and Scott were actual parties to several conversations themselves.

In United States v. Bynum, 475 F.2d 832 (2nd Cir. 1973), the court relied on §§ 2510(11) and 2518(10)(a) to confer standing to raise minimization. In Bynum, the actual wiretap was placed on the

telephone of Bynum's paramour from whose residence Bynum placed his narcotics-related calls. The court said that because calls of Bynum's were intercepted,

> Bynum was clearly an "aggrieved person" as defined in 18 U.S.C. § 2510(11) and therefore is given leave to raise the legitimacy of the surveillance under 18 U.S.C. § 2518(10).[13] Id. at 835-36 (footnote omitted).

See also United States v. Carubia, 377 F. Supp. 1099, 1107 (E.D. N.Y. 1974); United States v. Ceraso, 355 F.Supp. 126, 127 (M.D. Pa. 1973).

Although interpreting a different subsection of § 2518, United States v. Bellosi, 501 F.2d 833 (D.C.Cir. 1974)[14] lends further support to Daviage's and Scott's standing argument. In that case, the Government had procured a wiretap order without informing the authorizing judge that one of the targets of the wiretap had been a target of a prior wiretap relating to a different offense. The defendants challenged the propriety of the authorization in their motion to suppress, and the Government argued that only the specific defendant who had been the target of the prior wiretap had standing to challenge the surveillance evidence. The Government's

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13. This decision was the first appeal in Bynum. Its complete citation is United States v. Bynum, 475 F.2d 832 (2d Cir.), on remand, 360 F.Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, on remand, 386 F.Supp. 449 (S.D.N.Y. 1974), aff'd, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975).

A subsequent decision in the Bynum litigation, United States v. Bynum, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975), is cited in the Government's Brief in Opposition for the proposition that Congress did not intend to broaden standing principles in Title III. Id. at 6. This later Bynum decision, however, does nothing to weaken Daviage's and Scott's position. It simply held that eleven of the defendants did not have standing because none of them was a party to intercepted calls or possessed a proprietary interest in the premises in which the tapped telephone was located. The court went on to hold, however, that two other defendants, including Bynum, did have standing because they had been parties to intercepted communications.

14. Bellosi deals with the impropriety of the authorization to seek a wiretap, whereas the instant case concerns the legality of the execution of a legally authorized wiretap. This distinction, however, is not significant in determining the question of standing. Section 2518(10)(a) cites three occasions for suppressing wiretap evidence: (1) the communication was unlawfully seized, (2) the order of authorization or approval was facially insufficient, or (3) the interception was not made in accordance with the order of authorization or approval. Certainly these reasons go to both authorization and execution. There is nothing in the language of § 2518 (or § 2510(11)) which suggests that Congress intended different standing rules to challenge the authorization of a wiretap as opposed to its actual execution

argument was based on the purpose of suppression, i.e., that violations of § 2518(i)(e) would be sufficiently deterred if the evidence were suppressed only as to the specific victim of the double wiretap. The court responded by relying on the language of Title III:

> Though we would question the Government's judgment on how much a zealous law enforcement official would be deterred under its standing formula, we do not need to do so. It is sufficient to state that the Government's position has not been accomodated by the unambiguous criterion of standing set forth in Sections 2518(10)(a) and 2510(11)..[15] 501 F.2d at 842 (footnote omitted).

Despite the clear language of §§ 2518(10)(a) and 2510(11), the legislative history of Title III, and judicial interpretations of standing to raise fourth amendment claims both before and after Title III's enactment, the Government continues to argue that Daviage and Scott lack standing. In its Brief in Opposition, the Government seems to be making two arguments. It asserts that because the intercepted calls to which they were parties were all related to the purpose of the wiretap, they therefore lack standing. However, the Government parenthetically injects a second notion -- that Daviage and Scott lack standing because they were not the subscribers to the tapped telephone. See Brief in Opposition at 6.[16] For these arguments, the Government cites Alderman v. United States, supra; United States v. Poeta, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972); United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); and United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976); and United States v. Fury, 554 F.2d 522 (2d Cir. 1977), petition for cert. filed, (May 27, 1977) (No. 76-6828).

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15. In footnote 22, the Bellosi court relies on the legislative history of Title III, Alderman and Jones in support of its holding that all of the defendants had standing.

16. It is noteworthy that Thurmon, whose standing the Government does not contest, was likewise not the subscriber to the telephone. The subscriber was, in fact, Geneva Jenkins, although Thurmon apparently shared the premises.

Taking the second argument first, the Government looks for support to the one paragraph statement in United States v. Poeta, 455 F.2d at 122. In dealing with Poeta's allegation that the agents failed to execute minimization provisions in the wiretap order, the Poeta court says, simply, that although Poeta was a party to intercepted calls, the wiretap itself was on someone else's telephone, and, therefore, Poeta's rights were not invaded.

The only authority the Poeta court cites for its ruling is Alderman v. United States, supra, and to the extent that it relies on Alderman, it plainly misreads that opinion. Alderman states that fourth amendment rights are "personal" and cannot be "vicariously asserted." 394 U.S. at 174. Alderman, however, explains what is meant by violation of these "personal" rights by saying:

> Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself.... 394 U.S. at 176.

There is nothing in Alderman which limits standing to the actual subscriber of the telephone. By its very terms, the opinion says that one's own privacy is invaded if he is a party to intercepted communications.

Alderman states only the obvious: a telephone conversation does not "belong" to either participant alone. Spoken words which exist as electrical impulses along a wire cannot be said to be the "property" of one conversant and not the other. It is even more absurd to assert that, should such a proprietary interest exist in a telephone conversation, that "interest" fluctuates between Jones and Smith, depending on whether the Government attaches its listening device to Jones' telephone (while he is talking to Smith) or Smith's telephone (while he is talking to Jones). As Mr. Justice Brandeis noted in his famous dissent in Olmstead v. United States, 277 U.S. 438, 476 (1928):

> Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.

If there were any doubt as to whether a possessory interest in the telephone is required, such doubt was laid to rest in Katz v.

United States, supra. As Mr. Justice Stewart noted, "the Fourth Amendment protects people, not places." 389 U.S. at 351. In Katz the Government argued that since the petitioner's conversations were intercepted by tapping a telephone in a glass booth, he could not reasonably expect privacy. In rejecting this argument, the Court said that by using a telephone, petitioner meant to exclude "not the intruding eye— it was the uninvited ear." Id. at 352. Indeed, the Court explicitly recognized the sanctity of conversation itself:

> No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. Id. at 352 (footnotes omitted).

See also Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304 (1967); United States v. Hunt, 505 F.2d 931 (5th Cir. 1974).[17]

The Government's principal argument is that, as Daviage and Scott were parties to inculpatory calls and not to calls unrelated to the purpose of the wiretap, they do not have standing to raise minimization. The fundamental fallacy of this position is that it confuses standing with evidence of a failure to minimize.[18] There are several types of evidence which show a failure to minimize. One consists of particular interceptions which could not possibly have been interpreted as related to the wiretap when they were overheard. See infra, at p.48 n.64. Another is the agents' own in-court statements as to their conduct and the procedure followed

17. The Government attempts to bolster its proprietary interest argument by citing United States v. Ramsey, supra, and United States v. Hinton, supra. These two cases, however, both cite and explicitly rely on Poeta, thereby incorporating Poeta's misapplication of Alderman. Therefore, they suffer from the same analytic weakness which afflicts Poeta.

18. The Court of Appeals in Scott I also recognized this distinction:

> The question presented by the Government's challenge [to standing] is really whether some of the appellees can introduce evidence based on conversations in which they did not participate in order to attempt to demonstrate that the intercepted conversations to which they were a party were not, in the statutory phrase, seized "in conformity with the order of authorization." 504 F.2d at 197 (footnote omitted).

pursuing the wiretap. Both kinds of evidence were produced in the instant case in support of the minimization claims. See infra, at pp. 38-39. However, there is a fundamental distinction between evidence which goes to deciding the merits of a minimization claim and facts which must be shown in order to have standing to raise such a claim.

In support of its "evidence on merits equals standing" argument, the Government cites United States v. Fury, supra.[19] In Fury, two wiretaps were authorized - the "Schnell" tap and the "Fury" tap. After noting that some of the defendants did not have standing because they were not parties to any intercepted communication, the Court, at p. 526, says:

> Fury, on the other hand, has standing as an aggrieved person to challenge both the Schnell and Fury wiretaps. See New York Civil Practice Law and Rules ("CPLR") § 4506(2). Fury does not have standing, however, to raise the issue of improper "minimization" during the Schnell tap. That is because the tap on Schnell's phone and the failure to minimize the conversations intercepted is an invasion of Schnell's privacy, not Fury's. United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948, 92 S. Ct. 2041, 32 L.Ed.2d 337 (1972); People v. Fiorillo, 63 Misc. 2d 480, 481, 311 N.W.S.2d 574 (Montgomery Cty. Ct. 1970). See Alderman v. United States, 394 U.S. 165, 171-76, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); United States v. Hinton, 543 F.2d 1002 1011, n. 13 (2d Cir. 1976).

The Fury analysis is obscure at best. In the initial sentence the Court unequivocally states that Fury has standing as an aggrieved person. Yet, the court then takes back in the second sentence what it had seemed to confer in the first sentence. Thus, it would appear that Fury is setting up two standards: one for standing to challenge wiretap evidence generally, and a second to

19. Although it is not entirely clear what authority the Government cites in support of this argument, Daviage assumes that Fury is intended as support for the proposition. This assumption is based on the Fury court's citing of People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574 (Montgomery Cty. Ct. 1970), a New York trial court decision squarely supporting "evidence on merits equals standing." See the discussion of Fiorillo, infra, at p. 23.

raise the minimization violation specifically.[20] The opinion then cites People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574, (Montgomery Cty. Ct., 1970). That trial court decision squarely supports the Government's "evidence on merits equals standing" argument. The defendants had objected to the absence of provisions in the warrant to minimize interception of innocent telephone calls. After noting that the defendants had no innocent calls intercepted, the court ruled: "The aggrieved persons would be those whose unrelated telephone calls were intercepted." 63 Misc.2d at 481, 361 N.Y.S.2d at 576. Fiorillo is the only case Daviage has discovered which supports this argument of the Government.[21] Regrettably the Fiorillo opinion contains no reasoning or relevant case authority.[22] Fury's mere citation of Fiorillo thus adds no light.[23]

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20. The New York wiretap statute has its own standing and minimization provisions, and its own exclusionary remedy. Because "[t]he New York statute virtually tracks the language of Title III ," United States v. Tortorello, 480 F.2d 764, 772 (2d Cir.), cert. denied, 414 U.S. 866 (1973), it is admittedly difficult to conclude that New York's law sets out a double level standing criteria but that Title III does not. Nevertheless, Daviage indulges in the assumption that Fury's reference to standing under the New York statute was somehow not meant to pertain to standing under the minimization provision. Otherwise, the first sentence of the above quoted passage in Fury is directly contradictory to the second sentence.

21. There is a hint of this argument at the conclusion of the brief discussion of standing in United States v. Ramsey, 503 F.2d at 532. The court makes reference to the interpretation that "any casual caller engaging in innocent conversation ,"would have standing. Id.(emphasis supplied). The court then notes that because all of the calls in which Ramsey participated were inculpatory, he did not have standing. See also Brief for the United States in Opposition to the Petition for Writ of Certiorari, Fury v. United States, No. 76-6828 (Supreme Court of the United States, Oct. Term, 1977) at 4-5.

22. There is virtually no analysis in Fiorillo, and the only authority it cites is United States v. Serrano, 317 F.2d 356 (2d Cir. 1963). Serrano is not a minimization case, nor is it even an electronic surveillance case. The two paragraph per curiam decision apparently holds (the facts are not stated) that Serrano could not move to suppress evidence seized incident to the arrest of someone else. Serrano does not stand for the proposition that one must have made calls unrelated to the purpose of a wiretap order to have standing to raise minimization.

23. To make matters even more confusing, Fury invokes the proprietary interest language of Poeta and Hinton. To the extent that Fury seeks to invoke the reasoning of those cases, it is incorrect for the reasons already given.

Ultimately, the logic of the "evidence equals standing" position rests squarely on a bootstrapping argument relying on the nature of the calls intercepted rather than the parties to the calls intercepted. Since the calls to which Daviage and Scott were parties were inculpatory, so the argument goes, they should not be heard to complain that those calls were intercepted in gross and flagrant violation of the wiretap order. This reasoning does violence to well-established fourth amendment principles. As this Court said in Byars v. United States, 273 U.S. 28 (1927):

> Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search...may be used against the victim of the unlawful search.... Id. at 29-30.

See also United States v. DiRe, 332 U.S. 581 (1948).

The nature of the call was clearly not deemed relevant in a number of minimization cases. For example, in United States v. King, 478 F.2d 494, 506 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974), one defendant was held to have standing on the basis of having had one message sent at his direction over the tapped line. Although this message was apparently inculpatory, the court never inquired into the nature of the call in order to resolve the standing issue. Rather, it determined that the defendant had either been a party to an interception or been the person against whom the interception order was directed. This approach was followed in United States v. Bynum, 475 F.2d at 835-36, in which, again, the court never determined the nature of the interceptions before ruling on standing. See also United States v. Carubia, 377 F.Supp. at 1107; United States v. Ceraso, 355 F.Supp. at 127.

By focusing on the nature of the calls, the Government would have one believe that because the calls were inculpatory there was, a fortiori, no conceivable minimization issue. Daviage submits, however, that the issue remains vital regardless of the type of

calls intercepted. If a government agent attached a tape recorder to a private telephone line and left it running for thirty days with no monitoring,[24] it would be difficult to argue that the victim of those interceptions did not have standing to raise failure to minimize.[25] If, fortuitously, it turned out that all of the interceptions related to the purpose of the tape, the situation would nonetheless be that of a very fruitful general warrant. In short, to make standing to raise minimization or, for that matter, to make the merits of a minimization claim rest on the nature of the items seized, injects into search and seizure doctrine, a process that is tantamount to a general warrant-- the very evil which the fourth amendment was designed to eliminate.[26]

II. THE GOVERNMENT'S ROUND-THE-CLOCK SURVEILLANCE, ENTAILING INTERCEPTION OF EVERY CONVERSATION WITH NO GOOD FAITH ATTEMPT TO MINIMIZE THE INTERCEPTION OF NON-PERTINENT COMMUNICATIONS, CONSTITUTED A BLATANT VIOLATION OF 18 U.S.C. § 2518(5).

A. The Constitutional Significance Of The Minimization Issue.

In the case under review, this Court confronts, for the first time, the problem of construing the minimization requirement of 18 U.S.C. § 2518(5) and of defining the appropriate criteria by

24. Plainly the tape recording of a conversation without the contemporaneous reception by a human ear constitutes an interception within the § 2510(4) definition of "intercept ." Indeed, this very point was decided in United States v. Turk, 526 F.2d at 658:

> If a person secrets a recorder in a room and thereby records a conversation between two others an "acquisition" occurs at the time the recording is made.

25. This hypothetical fact situation differs from the instant case insofar as there was actual monitoring in this case. Of course, where there is a live ear overhearing each call, the situation is aggravated.

26. See Camara v. Municipal Court, 387 U.S. 523 (1967).

which compliance is determined. It is important to note at this point, however, that this Court's construction of § 2518(5) is laden with constitutional implications and its delineation of standards is necessarily limited by fourth amendment considerations.[27] It is well-settled that the concerns which guided the drafting of the fourth amendment[28] are equally applicable to a search and seizure effected by electronic surveillance. Indeed, it is precisely the revulsion toward the general warrant which prompted some to insist that electronic surveillance can never be "reasonable" within the meaning of that amendment.[29] As stated by Mr. Justice Brennan in his dissenting opinion in Lopez v. United States, 373 U.S. 427 (1963),

> electronic surveillance is almost inherently indiscriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult; Id. at 463.

Nevertheless, this Court has unequivocally established, in the last decade, that the stringent requirements of the fourth amendment applicable to conventional search and seizures are equally applicable to electronic surveillance; it is no longer open to question

27. Mr. Justice Miller, in his concurring opinion in Boyd v. United States, 116 U.S. 616 (1886), stated the underlying theme:

> While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for anything. Id. at 641. (Emphasis in original).

28. See, e.g., United States v. Leta, 332 F.Supp. 1357, 1360 n. 4 (M.D.Pa. 1971); United States v. Focarile, 340 F.Supp. 1033, 1046 (D.Md.), aff'd. sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1970), rev.'d on other grounds, 416 U.S. 505 (1974).

29. Mr. Justice Brennan posits that the "anomalous exceptions" to fourth amendment principles in Olmstead v. United States, 277 U.S. 438 (1928), Goldman v. United States, 316 U.S. 129 (1942), and On Lee v. United States, 343 U.S. 747 (1952), were in part the result of "the pervasive fear that if electronic surveillance were deemed to be within the reach of the Fourth Amendment, a useful technique of law enforcement would be wholly destroyed,..." Id. at 463.

that electronic surveillance may be "reasonable." Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

In establishing the standards by which the constitutionality of electronic surveillance under the fourth amendment is assessed, this Court focused on the requirement of particularity which acts as protection against the general warrant. In Osborn v. United States, supra, an attorney for James R. Hoffa was convicted of endeavoring to bribe a member of the jury panel in a prospective federal criminal trial. Admitted into evidence was a tape recording of a conversation made between the attorney and a government informer, who had a recording device concealed on his person during that conversation. Noting that the device was used "under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity'," Id. at 329, this Court held that the use of the device and the recording itself was permissible "for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." Id. at 330.

In its landmark decision in Berger, supra, this Court vigorously reasserted the importance of the fourth amendment's requirement of particularity. Mr. Justice Clark stated that

> the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations... . As with general warrants this leaves too much to the discretion of the officer executing the order. Id. at 59. (emphasis supplied).

Relying for the most part on this defect, but also noting the lack of other protective procedures, this Court held that the New York statute permitted "a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment." Id. at 64, (emphasis supplied.)

The most recent case of this trilogy, Katz, supra., again emphasized that the requirement of particularity is an essential component of a reasonable search and seizure. This Court held that, absent antecedent judicial authorization and determination of probable cause, the surveillance in that case violated the fourth amendment. However this Court also noted that

> the surveillance was limited, both in scope and in duration, ... The agents confined their surveillance to the brief periods during which he [petitioner] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself. Id. at 354. (footnotes omitted).

The constitutionality of a search and seizure, then, is heavily dependent upon satisfying the requirement of particularity. The drafters of Title III, seeking to meet the standards delineated in Osborn, Berger and Katz, were well aware of this and forged a procedure meant to conform with constitutional demands.[30] This Court, in deciding what compliance with § 2518(5) entails, must do so with this constitutional background in mind. However, this question, "fraught as it is with substantial constitutional overtones",[31] can be settled as a matter of statutory construction.

B. Standards Governing The Determination Of compliance With 18 U.S.C. § 2518(5).

Section 2518(5) of Title 18 provides in pertinent part:

> Every order...shall contain a provision that the authorization to intercept..., shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception....

The statute provides no further clarification as to the meaning of "minimize."[32] Although this Court has not previously construed the provision, several lower federal court decisions make it clear that § 2518(5) does not prohibit the interception of any non-pertinent conversations, but directs the Government to conduct the wiretap in a manner designed to reduce to the smallest degree possible the interception of conversations unrelated to the criminal activity under investigation. United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977); United States v. Armocida, 515 F.2d 29

30. See Bynum v. United States, 423 U.S. 952 (1975) (Mr. Justice Brennan, dissenting from denial of petition for writ of certiorari).

31. Scott v. United States, 425 U.S. 917, 925 (1976) (Mr. Justice Brennan, dissenting from denial of petition for writ of certiorari).

32. The legislative history of Title III offers no definition of "minimize", but merely reiterates the language of §2518(5). See S.Rep. No. 1097, 90th Cong. 2nd Sess. 103, reprinted in 1968 U.S. Code Cong. & Ad. News at 2192.

(3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

Such a construction of the requirement, while entirely consistent with the text of § 2518(5), also accurately reflects the intention of the drafters of Title III. The statutory scheme represents a balance, fashioned by Congress, between the competing values of law enforcement and the right to privacy.[33] By carefully prescribing the circumstances under which electronic surveillance may be authorized in accord with Berger v. New York, supra, and Katz v. United States, supra., Congress sought to afford effective techniques to combat organized crime while preventing "improper invasion of the right of privacy provided by the Fourth Amendment and...the indiscriminate seizure of communications...." United States v. Focarile, 340 F.Supp. at 1044. In a similar manner, the "minimization" provision is a balance between these conflicting goals. While recognizing that a requirement of absolute elimination of interceptions of innocent communications would seriously jeopardize the statutory purpose of crime control,[34] the drafters of Title III designed minimization as a safeguard against any invasion of privacy greater than necessary under the circumstances. See Berger, 385 U.S. at 57. Section 2518(5), then, "requires that measures be adopted to reduce the extent of such interception to a practical minimum while allowing the legitimate aims of the Government to be pursued." United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975).[35]

33. See pp.12-14, supra.

34. See United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974).

35. "What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance." S. Rep. No. 1097, 90th Cong., 2nd Sess. 101, reprinted in 1968 U.S. Code Cong. & Ad. News at 2190. United States v. James, 494 F.2d 1007, 1018 (D.C.Cir.), cert. denied, 419 U.S. 1020 (1974); see also United States v. Armocida, supra; United States v. Clerkley, supra.

1. The Good Faith Test.

Proceeding on the proposition that the surveillance must be "reasonable" to comport with § 2518(5), the federal courts have shaped a standard by which compliance with the minimization requirement can be assessed. The cases establish that the statutory command of minimization is satisfied if (1) the agents manifest a good faith effort to minimize the interception of innocent communications, and (2) the methods employed in minimization are reasonable in light of the circumstances. The courts have made clear that absent good faith efforts to minimize, the second inquiry should not be reached; the conduct of the surveillance is unreasonable per se. On the other hand, where attempts to comply are found, they must still conform to a standard of reasonableness.

This two-pronged standard[36] began its development in the early cases addressing the minimization issue. In United States v. King, 335 F.Supp. 523 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U. S. 920 (1974), the district court found that the Government had failed to comply with the minimization requirement. The authorizing order specified the communications which could be lawfully intercepted. However, the court found that the wiretap was in operation for forty-five days, twenty-four hours a day, and that the agents recorded every conversation regardless of the parties to or nature of the communication. Stating that"compliance with the provisions of the authorizing order requires those responsible for the execution of the wiretap to devise some means of limiting interception." to specified conversations, 335 F.Supp. at 541, the court was skeptical of the agents' adherence to the minimization requirement. It referred to one intercepted conversation which entailed forty-four pages of transcript. The conversation was completely irrelevant, with the exception of two pages in the middle of the tran-

36. The standard was first, and most clearly, articulated in United States v. Tortorello, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973). See discussion, infra, at pp. 33-35.

script. The Court stated:

> Nevertheless this Court is reluctant to find that this conversation should have been intercepted. The object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme Court in Berger v. New York, supra, and Katz v. United States, supra. By justifying blanket surveillance on the ground that something relevant might turn up at any moment, the requirement of minimization would be rendered nugatory and the right of privacy non-existent. Id. at 541. (emphasis supplied).

The court acknowledged the difficulties inherent in electronic surveillance but clearly recognized the threat to privacy should those difficulties be employed as justification for total interception. Indeed, the court pointed out that when the competing interests of law enforcement and privacy clash, deference must be given to the latter "out of respect for the parties' constitutional rights and for the limited system which Congress so painstakingly created." Id. at 542.

The opinion in United States v. Focarile, supra, represents an early effort by a court to carefully analyze the issue of minimization and to articulate guidelines for determining compliance with § 2518(5).

In Focarile, as in the instant case, there was total interception for thirteen days. Finding neither clarity nor consistency among the three cases construing the minimization provision - United States v. King, 335 F.Supp. 523 (S.D.Calif. 1971); United States v. Leta, 332 F.Supp. 1357 (M.D.Pa. 1971);[37] and United States v. Scott, 331 F.Supp. 233 (D.D.C. 1971) - the Court stated:

> Scott, King and Leta, as well as a common sense approach to the problem lead one to the conclusion that there can be essentially two different types of violation of the minimization requirement of § 2518(5). The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of "innocent" calls. This

37. Although Leta does not elaborate on the issue of minimization, it is significant insofar as it substantiates the good faith test. Recognizing that 100% interception may be necessary under some circumstances, and that while this is not unreasonable per se, "it may also be that 100% recording will take place without an effort to minimize where possible. In such a situation, 18 U.S.C. § 2518(5) will have been violated...." Id. at 1360 n. 4.

> first type of violation would obviously be a blatant violation of the provisions of Title III and, in addition, would probably violate the precepts of the Fourth Amendment. The second type of violation of the minimization requirement would be the one committed if there is an inadequate method or effort to minimize. Id. at 1046. (footnote omitted).

Thus the court emphasized that the threshold question is whether there has been any effort or "good faith" attempt to comply with § 2518(5). Absent such attempt, the agents' conduct is unreasonable under the terms of Title III and, under the command of Berger and Katz, violative of the fourth amendment. But, should there be manifestations of good-faith attempts to comply with § 2518(5),[38] the inquiry then focuses on the adequacy of those attempts. As numerous cases make clear, those efforts are measured in terms of reasonableness.[39] See discussion, infra, at pp.43-52.

On the issue of compliance with the statute, Forcarile purports to distill several fundamental ideas from the few previous cases. But more importantly, it establishes a basic test for ascertaining the propriety of governmental conduct, and that approach has been accepted in subsequent decisions.

A further illustration of the development of this test is United States v. Sisca, 361 F.Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974). The Government sought to justify total interception because of the

38. The cases have come to recognize several factors as manifesting the government's good faith efforts to comply with the minimization requirement. See, e.g., United States v. Hinton, 543 F.2d 1002, 1012 (2d Cir.), cert. denied, 429 U.S. 980 (1976); United States v. Rizzo, 491 F.2d 215, 217 (2d Cir.), cert. denied, 416 U.S. 990 (1974); United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976) (system of "spot-checking" to insure that conversations initially innocent did not turn to pertinent subjects); United States v. Clerkley, 556 F.2d at 718; United States v. Tortorello, 480 F.2d at 784; United States v. Cox, 462 F.2d at 1301, (judicial supervision); and United States v. Turner, 528 F.2d at 158; United States v. Falcone, 364 F.Supp. 877, 887 (D.N.J. 1973), aff'd, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975); United States v. Lanza, 349 F.Supp. 929, 932 (M.D.Fla. 1972) (instructions to the agents executing the wiretap).

39. The Focarile court found the efforts to minimize reasonable under the circumstances.

inherent difficulties faced by the monitoring agents. The court acknowledged the practical problems involved, yet decided that

> the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. Id. at 745.[40]

The import of this language is precisely that the agents made no attempts to minimize.

The good faith test developed by these district court cases has been uniformly adopted among the circuits. The appellate opinions consistently require that the monitoring agents make good faith attempts at minimization, either explicitly, by finding the requisite good faith effort, or implicitly, by immediately proceeding to determine the reasonableness of the attempts. With the notable exception of the Court of Appeals for the District of Columbia in Scott II, no court has found compliance with § 2518 (5) where the record shows, as it does here, that the agents made no effort to minimize the interception of non-pertinent communications.

In United States v. Tortorello, supra, the appellant contended that the surveillance was conducted in a manner that resulted in unnecessary monitoring and recording of irrelevant conversations. This, he urged, violated the fourth amendment and the provisions of the authorizing order requiring minimal interception of non-pertinent communications pursuant to § 2518(5). The court stated: "The question raised here is whether the executing officers took reasonable measures to minimize the interception of irrelevant communications." 480 F.2d at 783 (emphasis supplied). Looking to the existing case law for guidance, the court then discussed the district court's initial opinion in the instant case which

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40. Because the motion to suppress the evidence derived from the wiretap was not timely made, the court's discussion on the merits is dicta. The Court felt, however, that a discussion would be "desirable" in light "of the importance and relative novelty of the minimization question and the evolving law or the subject." Id. at 742.

suppressed the wiretap evidence. Tortorello concluded: "In short, the court [in United States v. Scott, 331 F.Supp. 233 (D.C.C. 1971)] found that there was no attempt by the officers to devise some means of limiting interceptions." 480 F.2d at 784.

The court in Tortorello compared the conduct of the agents who executed the wiretap in that case with the conduct of the agents in Scott. It noted that the agents in the case before it showed "good judgment" in devising patterns to guide their minimization efforts. Moreover, they considered the identity of the caller, the guarded nature of the conversation, the tone of voice and the subject matter and "[a]s soon as it was determined that any conversation overheard was not pertinent, all interception immediately ceased." 480 F.2d at 783. Referring to United States v. King, supra, and United States v. Sklaroff, 323 F.Supp. 296 (S.D.Fla. 1971), the court framed the test which should govern the determination whether there has been compliance with the minimization requirement:

> It is clear from these decisions that a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion. 480 F.2d at 784.

Since "the officers respected the privacy of the persons under surveillance and utilized effective safeguards against excessive intrusion", Id. at 785, the court ruled that the wiretap evidence was properly admitted.[41]

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41. See People v. Floyd, 41 N.Y.2d 245, 392 N.Y.S.2d 257 (1976), where the court of appeals construed the virtually identical minimization requirement of New York C.P.L. 700.30, subd. 7. Quoting United States v. Tortorello, supra, the court stated:

> Minimization may be defined as a good faith and reasonable effort to keep the number of non-pertinent calls intercepted to the smallest practicable number. Id. at 262.

That court recently reaffirmed this application of the two-prong standard in People v. Brenes, 42 N.Y.2d 41, 396 N.Y.S.2d 629 (1977), stating that "the primary question is whether, realistically considered, there was a good faith attempt to affirmatively avoid interception of conversations unrelated to the crime or crimes authorized to be investigated...." Id. at 633.

The Tortorello test for assessing compliance with the minimization requirement clearly contemplates more than merely reasonable results. At the very least, reasonableness of conduct must include a good-faith effort to avoid that intrusion.

This good faith test in assessing compliance with the minimization requirement has been consistently applied in the Second Circuit. In United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974), where total interception was held reasonable under the circumstances, the court discusses the good faith requirement in the context of judicial supervision,[42] stating that "the degree of judicial supervision is an important factor in determining whether a good faith effort to minimize was attempted." In United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974), the court of appeals again had occasion to determine compliance with § 2518(5). It reiterated the principle established in Tortorello, stating that the statute requires "that the methods used to effect minimization be in good faith and reasonable." The court held that the Government had made a prima facie showing of compliance with the minimization provision, attaching great significance to the trial court's finding of good faith.[43]

The validity of the good faith test was most recently affirmed in United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976). In that case, the agents conducting the surveillance took several steps to minimize the interception of innocent communications, such as "spot checking" to insure that conversations initially non-pertinent did not become ones subject to interception, and employing a maximum time period of five minutes to ascertain the nature of the call. Further, this was "not a case where every conversation coming into and emanating from the wiretapped residences was recorded and overheard in its

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42. See infra, at p. 36.

43. The court stated: "We are aided by the trial court's finding that the law enforcement agents here made a 'good faith effort to minimize'... ." 488 F.2d at 599.

entirety," Id. at 1012, as is the instant case. To determine compliance with the minimization requirement, the court stated:

> We must look to whether the agents devised a reasonable means of limiting interception, and to whether they utilized those safeguards in good faith. Id. at 1012 (emphasis supplied).

The court held that the agents complied with the requirement, stating that "it appears that a good faith attempt was made to limit intrusion into private intimacies so as to preserve the privacy interests of those whose conversations were monitored." Id. at 1012.[44]

This standard has been widely adopted in the other circuits. In United States v. Clerkley, supra, the Court of Appeals for the Fourth Circuit agreed that a showing of reasonableness necessarily requires a showing of a good faith attempt to minimize. Quoting Tortorello, it stated:

> The statute is deemed to be satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." 556 F.2d at 716.

The court's holding that the Government had complied with the requirement was due in part to its finding that "[w]here the authorizing judge required and reviewed interim reports, courts have been more willing to find a good faith attempt at minimization." Id. at 718. Similar language of good faith is present in United States v. Quintana, 508 F.2d 867 (7th Cir. 1975).[45]

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44. See also United States v. Fino, 478 F.2d 35 (2d Cir. 1973) cert. denied, 417 U.S. 918 (1974), where the court accepted "the finding of the district court that 'the evidence established a good faith effort on the part of the monitoring agents to discontinue all calls believed to be of a non-pertinent nature.'" Id. at 38.

45. In the instant case, the judicial supervision was exercised in an effort to enforce minimization was inadequate at best. See discussion infra, at 51-52.

Numerous other cases amply demonstrate the continued vitality of the requirement that the executing agents make good faith attempts to minimize. See United States v. Daly, 535 F.2d 434, 442 (8th Cir. 1976); United States v. Armocida, 515 F.2d 29, 42 (3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Chavez, 533 F.2d 491 (9th Cir.), cert. denied 426 U.S. 911 (1976); United States v. Turner, 528 F.2d 143, 156-57 (9th Cir.), cert. denied, 423 U.S. 996 (1975).[46]

The good faith requirement is not only firmly embedded in the case law but is essential in order to insure that the protection for privacy which is built into Title III is more than theoretical:

> Once the decisive test of the validity of an interception becomes its "objective reasonableness," there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps.
>
> * * *
>
> [Such a test] appears to destroy any incentive for law enforcement agents conducting wiretap surveillances to respect the rights of citizens to privacy in non-criminal telephone conversations in advance of their intrusion.[47]

The good faith test effectively mitigates the dangers of retroactive validation. By requiring an initial regard for the right of privacy, it insures that, at the very least, § 2518(5) will encourage the development of techniques designed to limit unnecessary intrusion. To the extent that the good faith test is eliminated or relegated to a subordinate role,[48] the minimization provision

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46. Cf. Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir. 1975), cert. denied, 425 U.S. 944 (1976), where the court found that a good faith defense to liability under 18 U.S.C. § 2520 will be established where the agents demonstrate that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of the case and that this belief was itself reasonable.

47. Scott II, 522 F.2d at 1334 (Statement of Circuit Judge Robinson, as to why he would grant rehearing en banc).

48. This is precisely what the court in Scott II did. See discussion, infra, at p.40.

becomes largely a hollow protection.

2. The Application Of The Good Faith Test In The Scott Litigation.

In the first interlocutory appeal in these proceedings, the court of appeals determined that the lower court had applied an improper standard in finding that the agents failed to comply with the minimization requirement.[49] The court stated:

> As James and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception.
>
> * * *
>
> It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty percent of the intercepted conversations appeared to be unrelated to narcotics transactions.
>
> * * *
>
> This court's intervening opinion in James indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis. Scott I, 504 F.2d 194 at 198, (D.C. Cir. 1974).

Following remand, the district court made the following findings of fact:

> 3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.
>
> 4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.
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> * * *

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49. The decision in this first interlocutory appeal was held in abeyance pending issuance of the opinion in United States v. James, 494 F.2d 1007 (D.C.Cir.), cert. denied, 419 U.S. 1020 (1974). In James, the court unequivocally adopted the Tortorello standard. Nevertheless, in applying the test, James did not discuss the good faith efforts of the agents. It is not clear from the opinion whether the court implicitly found good faith efforts or merely ignored this standard despite the purported adoption of the Tortorello test.

> 10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath...that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows [in part]:
>
> Q Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?
>
> A That is correct, Your Honor.
>
> * * *
>
> 13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.[50]

These findings of facts are amply supported by the testimony of the Government's witnesses. They repeatedly stated that there were no efforts to minimize the interception of innocent conversations. Agent Cooper conceded that "there were no limitations placed on the interception of calls in this particular operation, in this particular instance."[51] Indeed, this issue is not disputed by the Government, whose counsel stated during argument on remand that "we have never disputed at any point in this litigation that any attempts were made as a discretionary matter to minimize and I think that's what the agent said."[52] Confronted with the Govern-

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[50] Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3-6. See the Addendum to this Brief, infra, at III-VI.

[51] Transcript of Proceedings of October 15, 1974 in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 98. A copy of the transcript is included in the original record in this Court.

[52] Transcript of Proceedings of October 18, 1974 in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 681. A copy of the transcript is included in the original record in this Court.

ment's concession that no efforts were made to comply with the minimization requirement, the district court held that "[t]he admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable"[53] and suppressed all the evidence derived from the wiretap.

Following the Government's second interlocutory appeal, the court of appeals again reversed the district court's decision to suppress the wiretap evidence. In assessing compliance with the minimization requirement, the court focused on the reasonableness of the ultimate results, and discarded the subjective intent of the agents as an independent factor to be satisfied:

> For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied but the decision on the suppression motion must ultimately be based on reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions. Scott II, 516 F.2d at 756 (footnote omitted and emphasis supplied).

In effect, Scott II utilized a "Monday-morning quarterback" standard where the interception of a communication is justified on the basis of a hindsight evaluation of reasonableness. This approach distorts the Tortorello standard and, as a practical matter, makes the agents' subjective intent irrelevant. By stating that "if every call intercepted had been narcotic related, there would have been no occasion to consider whether it was necessary to minimize", Id., the court permits the ultimate results to justify an admitted failure even to attempt compliance with the minimization. This is tantamount to permitting an illegal search

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[53] Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 7. See the Addendum to this Brief, infra, at VII.

to be legitimized by what is found. In the context of traditional search and seizure doctrine, this Court has made it clear that the results of a search are not to be utilized in determining reasonableness. In United States v. DiRe, 332 U.S. 581 (1948), this Court spoke to the argument that the fruits of the search manifest its reasonableness, responding: "We have had frequent occasion to point out that a search is not to be made legal by what it turns up," Id. at 595 (footnote omitted). See also Byars v. United States, 273 U.S. 28, 29 (1927) in which the court stated: "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute." To the extent that the courts prefer "to consider wiretaps within the framework of the general law of search and seizure and to follow its principles," this Court has already declared the impropriety of post-search justification. See, e.g., United States v. King, supra.

Allowing post-hoc analyses to control the determination of compliance places too high a value on the Government's law enforcement objectives at the expense of constitutionally protected privacy. The court in United States v. King stated:

> The requirements of the Fourth Amendment cannot be met by interceptions executed in a blanket fashion with the hope that the passage of time may invest them with a relevance not immediately apparent. 335 F.2d at 543.

Moreover, as the courts have recognized, retrospective analyses are often misleading and inaccurate. They represent merely an advocate's portrayal or characterization of what appeared to the agents during the surveillance.[54]

The call analysis relied upon by Government in the instant case suffers from these infirmities. The district court found:

> 12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were

[54] Minimization is not to be judged by a rigid hindsight that ignores the problems confronting the officers at the time of the investigation. United States v. Vento, 533 F.2d 838 (3rd Cir. 1976).

> not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap." Mr. Kellogg described the "call analysis" as "...purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to infer, or assert that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no[t] insofar as I understand. Tr. Hearing on Remand, p. 436 ....
>
> 12. [sic] The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.[55]

The courts which have addressed this issue have uniformly stated that reasonableness of interception and of compliance with § 2518(5) must be determined in light of the facts known to the agents at the time. See, e.g., United States v. James, 494 F.2d 1007, 1022 (D.C.Cir. 1974), cert. denied, 426 U.S. 911 (1976); United States v. Laborga, 336 F.Supp. 190, 196 (W.D.Pa. 1971); United States v. Falcone, 364 F.Supp. 877, 887 (D.N.J. 1973), aff'd, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975). Establishing reasonableness of the agents' conduct via a call analysis prepared after-the-fact and incorporating characterizations admittedly foreign to those used by the executing agents contradicts the general principle that "[t]he test of whether or not the minimization requirements are complied with is not retrospective but contemporaneous." United States v. Sisca, 361 F.Supp. at 735.[56]

[55] Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. No. 1988-70 and 1089-70 (United States District Court for the District of Columbia) at 5-6. See the Addendum to this Brief, infra, at V-VI.

[56] The district court emphasized this problem during a "status call" hearing:

> This "Call Analysis" differs from the call analysis that was made by the agents who were on the spot and the ones who were directed to comply with the order of minimization. Under such circumstances, there was a complete violation and I consider that even if the "Call Analysis" were correct, it is in the teeth and in derogation of the characterizations that the persons who were charged with the duty to make the characterizations are made.

Transcript of Proceedings of November 8, 1974, in United States v. Scott, et al., Crim.Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 14-15. A copy of the transcript is included in the original record in this Court.

Daviage does not contend that such "Monday-morning quarterbacking" is totally inappropriate. Although post-hoc analysis cannot be utilized as the sole basis for establishing compliance with § 2518(5), it can provide a "starting point", United States v. Armocida, 515 F.2d at 43, or "offer some insight on that issue." United States v. Focarile, 340 F. Supp. at 1049. However, such use must be narrowly limited when there is other direct and explicit evidence pertaining to the agents' compliance with the minimization requirement. Indeed, in the instant case, the circumstantial evidence provided by the call analysis must be viewed with caution.[57] There was ample testimony from the agents concerning their knowledge, conduct and intentions which makes their clear disregard for § 2518(5) manifest; the call analysis is an obvious attempt to rationalize the agents' behavior and should be accorded appropriate weight.

3. Reasonableness Of The Efforts To Minimize Interception Of Non-Pertinent Communications.

The application of the two-pronged Tortorello standard to the facts of this case requires reversal because of lack of good faith attempts to comply with § 2518(5). However, should this Court find that the agents' good faith has been demonstrated, or decide that this test should not be applied, it is necessary to determine the reasonableness of the actual minimization. The courts have identified several factors that determine the degree of minimization required in a given case. Typical of these cases is United States v. James, supra , which delineates four factors: i) scope of the criminal enterprise under investigation; ii) location and operation of the wiretapped telephone; iii) the Government's expectation of the contents of the calls; and iv) judicial supervision by the authorizing judge. See United States v. Clerkley, 556 F.2d at 716-718; United States v. Daly, 535 F.2d at 441-442; United States v. Quintana, 508 F.2d at 874-875. Assuming arguendo,

57. In the instant case, the Government's call analysis focuses on categories of calls and relies on percentages to show proper minimization. However, more revealing might be percentages of time for recorded conversations. See, e.g., United States v. King, supra, where the Government argued that only fourteen per cent of the calls were subject to minimization. The court deemed such percentage misleading because the percentage of calls was not necessarily proportional to time. 335 F.Supp. at 542.

that this Court needs to reach the issue of the reasonableness of actual minimization efforts, the record demonstrates that 100% interception was not reasonable compliance with the statutory requirement of minimization.

i) Scope of The Criminal Enterprise Under Investigation.

Although the court in Scott II stated that "[t]he trial court made no specific findings with respect to this factor," 516 F.2d at 758, the district court did consider it:

> That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.[58]

Scott II makes short shrift of this factor, asserting that a "thorough surveillance" was justified because of the "[operation of] a fairly extensive narcotics business." Id. at 758. The surveillance here was much more than "thorough"; it was unlimited. Moreover, the scope of the enterprise was considerably less than that in James, which involved forty-five persons charged in seven separate indictments. Although the cases have recognized that large-scale, far-flung criminal enterprises may justify a lesser degree of minimization,[59] the testimony adduced at the evidentiary hearing revealed that the identities of conspirators gradually became known and that the actual scope of the operation was substantially narrower than originally believed. However, despite the trial court's explicit finding of fact, the court of appeals found that, while smaller geographically, the conspiracy's complexity

58. Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3. See the Addendum to this Brief, infra, at III. Note, however, that Scott II incorrectly applies this finding only to the third criterion.

59. United States v. Chavez, 533 F.2d at 493-494; United States v. Clerkley, 556 F.2d at 716.

remained unchanged. Scott II, at 759. The mere fact that the criminal operation was a local, retail business rather than an interstate, international enterprise necessarily means a change in complexity.

The James court, in noting that more complex conspiracies may justify greater surveillance, added that "if this thesis is taken to the extreme, the minimization requirement could be emasculated." 494 F.2d at 1020. Clearly, where the conspiracy under investigation is not particularly sophisticated, where its contours and members are increasingly well-defined, and where the scope narrows, it is an extreme position to allow total interception.[60]

In relation to this factor, Scott II claimed that the use of coded language or "jargon" justified greater surveillance. Assuming that such a circumstance is appropriately considered,[61] the record

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60. See United States v. Sisca, 361 F.Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974) where the court acknowledged the nature and extent of the criminal narcotics enterprise being carried on and the great difficulties confronted by the agents. It noted, inter alia, the large number of participants in varying roles, the constantly expanding information pertaining to the operation; and the guarded and coded language. Nevertheless, it held that

> the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. Id. at 745.

61.

> The fact that many criminal conversations are carried on in guarded language, code words, or jargon peculiar to the particular subculture should not be invoked as justifying circumvention of the minimization requirement. It is reasonable to assume that agents assigned to a specific case, regardless of whether or not electronic surveillance is involved ordinarily are familiar with the argot of the group under investigation. Deliberately evasive conversations pose more of a problem, but not one that is insoluble. In many cases of cryptic conversations, a literal interpretation of the words exchanged would render them nonpertinent; the tone and manner of discussion, however, would indicate, even to the ear untrained in the art of law enforcement, that the innocuous exchange is a camouflage for criminal conversation. See, e.g., the two conversations transcribed in United States v. Bynum, 360 F.Supp. 400, 412-13 n.10 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), petition for cert.filed, 42 U.S.L.W. 3353 (U.S.Nov. 11, 1973) (No. 73-856). Furthermore, a law enforcement officer who has screened hundreds of calls between criminal suspects should be in a good position to

completely contradicts this conclusion. The testimony demonstrates that, while code terms were used, the executing agents were well-versed in the language and were not handicapped by it.[62]

ii) Location and Operation Of The Wiretapped Telephone.

James found that where "a telephone is used exclusively to conduct illegal business and is located in a place which serves no residential or [legitimate] business purpose... less stringent minimization standards are both reasonable and permitted by Title III." 494 F.2d at 1020. It is not disputed that the telephone tapped in the instant case was located at a residence; further, at least sixty per cent of the calls intercepted were not related to narcotics. This is certainly a different situation from that in James where the telephone was used entirely for conducting an illegal enterprise and the apartment where it was located was used exclusively for the operation of the

(fn. 61 cont'd.)

> sift the coded conversations from the innocuous ones. If he reasonably and in good faith intercepts an entire conversation that he believes to be coded, the Government should not be penalized for his judgmental error if, in retrospect, the call turns out to be nonpertinent. On the other hand, facially innocent calls must be presumed to be nonpertinent, and the reasonableness of an agent's belief that a conversation is in code must be tested by objective standards. Cf. note 118 infra. If the rule were otherwise the Government could point to the possibility of coded calls as a rationale for interception of most, if not all, nonpertinent calls. 26 Stanford Law Review 1411, 1419-1420 n. 42 (1974).

62.

> A. [Agent Cooper] Well, there were numerous code terms used. It appears that certain individuals who became identified as callers, or customers, or suppliers, or whatever, would use their own terminology; not everyone used the same type of terminology. Once this terminology had been learned by us, that is, by agents of the Bureau during the operation of the wire intercept that had been completed not too long before this one, so we were alert for this type of language.
>
> * * *
>
> Q. [Mr. Dreos - Daviage's trial counsel] Well, I'm asking you, you did indicate that most of these people were experienced, isn't that correct?
>
> A. [Agent Cooper] They had at least a year's experience and were aware of the code of language that was being used.

Transcript of Proceedings of October 15, 1974, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 75-76, 170. A copy of the transcript is included in the original record in this Court.

sale of narcotics. Scott II found "that [the telephones] were not entitled to the same extent of protection as would be afforded in the case of telephones used primarily for lawful purposes." 516 F.2d at 759. Yet, the telephone here was primarily used for lawful purposes. The district court concluded that the telephone was "notthe type of 'business' phone as was used in James. "[63]

iii) Government Expectation Of The Contents Of The Calls.

James stated that the Government's expectation of the contents of the calls is a factor to be considered in determining the degree of minimization required. For instance, if an agent knows the identities of those suspected or the times frequently used to transact "business", the agent can tailor minimization efforts to avoid monitoring non-pertinent calls. James noted that while "[t]hese considerations affect the initial minimization tactics employed by the government," 494 F.2d at 1020, they also are directed to the agents' minimization policy during the wiretap, as categories of innocent communications develop. Id. at 1020-1021.

The court in Scott II adopted this notion that the degree of minimization required may change in accordance with the information revealed by the ongoing wiretap:

> Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigatic Once the monitoring agents have suff t data to conclude that a particular type of conversation is unrelated to the criminal investigation, the minimization requirement obliges them to avoid intercepting future conversations as soon as they can determine that it falls within that category. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization. 516 F.2d at 754-755 (footnote omitted).

Thus Scott II conceded that, while total interception is reason-

63. Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3. See the Addendum to this Brief, infra, at III.

able where the surveillance does not reveal patterns of innocent conversations, once those patterns develop minimization is required.[64] See also United States v. Quintana, 508 F.2d at 874 (7th Cir. 1975).

In the instant case, certain patterns did develop, yet the agents made no adjustments whatever of their policy of total interception. The district court in its first suppression opinion noted that

> there comes a time when an officer should reasonably assume that a particular conversation does not involve drugs. The conversations between Geneva and her mother serve as the most blatant examples of this. 331 F.Supp. at 247-48.

During the period of the wiretap, the agents intercepted in their entirety seven calls between Geneva Jenkins, a suspected conspirator, and her mother. The conversations usually entailed several pages of transcript and afforded ample opportunity for appropriate adjustment by the agents. However, while the wiretap revealed that the mother was not involved in the conspiracy,[65] the

64. The instant case presented a situation where categories of nonpertinent calls were apparent at the outset of the surveillance. The district court noted:

> For example, the intercept transcript at page 47 shows a call from Riggs National Bank to Thurmon seeking to verify a signature on a check; at pages 148-150 shows a conversation between Geneva and another female about a possible job opening and Geneva's qualifications for it; and at page 280 a call to the Weather Bureau and the response. It is common knowledge that when one calls for a weather report he will get a tape recorded response. 331 F.Supp. at 247.

65. Q. [Mr. Palmer] And you never had any single piece of information, did you, that the mother was involved in any way with this illicit dealing in narcotic drugs, did you?

A. [Agent Cooper] No, we did not.

Transcript of Proceedings of April 16, 1971, in United States v. Scott, et al., Crim. No. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 325. A copy of the transcript is included in the original record in this Court.

agents made no attempt to minimize these conversations.[66] This pattern had clearly developed by the time Miss Jenkins and her mother were talking for about the fourth or fifth time, yet the agents, despite their admitted awareness of this "category,"[67] continued total interception.[68]

Other patterns were also evident.[69] As early as the fifth day of the surveillance, it became apparent that the period of time from midnight to six a.m. was rarely used to conduct "business" and that the agents were aware of this fact. Still no consideration was given to reducing the operation of the wiretap.[70]

Another pattern was lawyer-client communications. The Government's plan in connection with those calls perhaps best reveals how lightly it regarded the statutory minimization requirement. The agents were instructed to cease monitoring these conversations if they were determined to be privileged. While this is the only instance where the agents developed a plan in

66. Id. at 350, 353.

67. Id. at 356.

68. Scott II admits that had this pattern been more fully developed, "the agents could no longer have had a reasonable expectation of discovering material evidence and thus should have acted to minimize the interceptions." 516 F.2d at 758. To postpone minimization on the merest chance that a conversation will turn to a pertinent subject would make the requirement meaningless. See United States v. King, 335 F.Supp. at 543.

69. It has already been noted that the interception revealed a local retail operation instead of the anticipated interstate importation and distribution enterprise. Even assuming the propriety of total interception with the expectation of the latter, it follows that the subsequent discovery of a smaller conspiracy would require a greater degree of minimization.

70. Transcript of Proceedings of October 15, 1974, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at pp. 192-98. A copy of the transcript is included in the original record in this Court.

advance to minimize, the procedure to be employed was so cumbersome as to be meaningless. It required the monitoring agents to continue interception of the suspected privileged call until Assistant United States Attorney Harold J. Sullivan could be contacted. Only when Sullivan determined that the conversation was between lawyer and client, discussing the case under investigation, would interception cease. It appears that surveillance would continue unabated if the lawyer-client conversation related to a matter not connected to the case under investigation.[71] Such a procedure creates the precise evil that § 2518(5) is designed to remedy, i.e., the interception of unrelated communications.

Despite the development of patterns of innocent communications and the agents' awareness of those patterns, there was no adjustment whatsoever of the minimization policy. The entire surveillance entailed 100% interception. Such conduct is patently unreasonable and demonstrates the Government's blatant disregard of the minimization requirement.

iv) Judicial Supervision By The Authorizing Judge.

James states that "[t]he most striking feature of Title III is its reliance upon a judicial officer to supervise wiretap operations." 494 F.2d at 1021.[72] Of the four criteria stated in James, the degree of judicial supervision is most often relied upon by the courts in finding reasonable compliance with minimization provision. The effect of that supervision is to force agents on a continuing basis to conform their actions to the law. See United States v. Bynum, 360 F.Supp. at 410. Moreover, where the

71. Transcript of Proceedings of April 16, 1971, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 308. A copy of the transcript is included in the original record in this Court.

72. The fundamental importance of judicial scrutiny within the Title III context is demonstrated by Congress' expressed intent to conform that statute to the principles enunciated in Katz v. United States. See supra, at p.16 n.12, In Katz, this Court found that the surveillance violated the fourth amendment despite its narrow limits. The decision was based on the lack of a neutral predetermination by a judicial officer. Minimization cases, like Katz, emphasize the essential protection afforded by judicial supervision. See e.g. United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y.), aff'd. 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974).

authorizing judge required and reviewed interim reports,[73] courts have been more willing to find a good faith attempt to minimize unnecessary interceptions. United States v. Clerkley, 556 F.2d at 718; United States v. Quintana, 508 F.2d at 875; United States v. Focarile, 340 F.Supp. at 1048.

Judicial supervision necessarily contemplates full awareness and understanding by the judicial officer of the nature and scope of and parties to the conspiracy. Absent complete knowledge of the investigation, the protection afforded by judicial supervision is impossible.[74] The trial court in Scott found:

> 9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize. (emphasis supplied).[75]

The reports submitted to Judge Smith revealed no more than the total number of communications per day and the number of those that were narcotic related. The reports contained some highlights, "but none of them revealed that the agents were listening to and recording in full and indiscriminately all conversations passing through the subject telephone." Scott, 331 F.Supp. at 248. Further, it may well be that the Government's failure to indicate in its report the actual scope of the criminal enterprise under investigation, resulted in judicial supervision geared to an investigation of greater

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73. 18 U.S.C. § 2518(6) authorizes the judge to require that reports be submitted to him periodically showing progress and justifying the need for continued interception.

74. See United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975).

75. Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 4. See the Addendum to this Brief, infra, at IV.

complexity.[76] As a result Judge Smith was unable to provide the judicial supervision contemplated by James and similar cases.

In summary the fact that every conversation is intercepted does not necessarily render the surveillance violative of § 2518 (5). See United States v. Armocida, 515 F.2d at 42-43; United States v. Bynum, 485 F.2d at 500. However, the analysis required by James of the factors relevant to assessing compliance with § 2518(5) clearly indicates that 100 percent interception was not justified in the instant case, and that the Government did not do all that it could to avoid unnecessary intrusion. Even if this Court finds that the intentional flouting of the statutory command by the executing agents was not unreasonable per se, Daviage contends that total interception, under the circumstances, was a violation of the minimization requirement.

III. BECAUSE THE GOVERNMENT MADE NO GOOD FAITH ATTEMPT TO ABIDE BY THE MINIMIZATION REQUIREMENTS, THIS CASE IS AN APPROPRIATE ONE IN WHICH TO INVOKE THE SANCTION OF COMPLETE SUPPRESSION.

In neither Scott I nor Scott II did the court of appeals find a breach of the minimization provision. Consequently, neither of those opinions had addressed to reach the remedy issue. Nevertheless, the court in Scott II, in an extensive footnote, 516 F.2d at 760 n. 19, suggests that had it reached the issue, it would have ruled in favor of suppression of only the non-relevant conversations. The district court, however, held that the minimization violation demanded suppression of the entire intercept. The remedy issue is very much alive in the instant case, as well as a subject of controversy throughout federal and state jurisdictions. Notions of judicial economy call for this Court to determine appropriate guidelines.

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76. It is unclear from the record whether Judge Smith was ever made aware of the proper conspiracy under investigation. The conspiracy revealed by the intercept, i.e., local, intra-Washington sales, was of an admittedly lesser scope than that anticipated. The affidavits for the original tap and for the extension, emphasized the international, interstate conspiracy. See Affidavits of Glennon L. Cooper, dated January 24, 1970 and February 4, 1970, respectively. Copies of the Affidavits are included in the original record in this Court.

A. The Statutory Suppression Mechanism.

The Government made no effort to adhere to the judicially authorized wiretap order. For this reason, the entire intercept should be suppressed. This result is supported by the statutory exclusionary mechanism codified in 18 U.S.C. § 2515, as well as by case law and the traditional rationale underlying the judicially-created exclusionary rule.

Section 2515 provides, in pertinent part:[77]

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received into evidence in any trial...if the disclosure of that information would be in violation of this chapter.

This section is the statutory remedy for the right provided in § 2518(10)(a).[78] This latter section provides that an aggrieved person[79] may invoke the suppression sanction if "the interception was not made in conformity with the order of authorization or approval." Section 2518(10)(a) further states:[80]

> If the motion [to suppress] is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom shall be treated as having been obtained in violation of this chapter.

The language of § 2518(10)(a) indicates, therefore, that upon proving that the monitoring agents failed to comport with the provisions of the judicial order of approval, the aggrieved person may invoke the explicit suppression remedy of § 2515.[81]

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77. The entire text of § 2515 is quoted supra, at p. 3.

78. See S. Rep.No. 1097, supra, 106, reprinted in 1968 U.S.Code Cong. & Ad. News at 2195.

79. See discussion supra, at pp. 10-21.

80. The entire text of § 2518(10)(a) is quoted supra, at 4.

81. The legislative history highlights the close interplay between §§ 2515 and 2518(10)(a):

> [Section 2515] must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. * * *
>
> This provision [§ 2518(10)(a)] must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515.
>
> S. Rep. No. 1097, supra, 96, 106, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185, 2195.

B. The Government's Suppression Remedy Is Inadequate.

Insofar as the Government's position can be gleaned from its briefs filed in prior stages of this litigation,[82] it apparently urges that only the "innocent" conversations should be "suppressed". Its position presumably rests on an anology to the doctrine of the over-extended search in cases involving traditional search and seizure of tangible items. See Marron v. United States, 275 U.S. 192 (1927), and United States v. Thweatt, 483 F.2d 1226 (D.C.Cir. 1970). This argument states that evidence seized other than that specified in the warrant itself should be suppressed, but that evidence gained by that part of the search conducted appropriately or evidence which falls within a recognized exception, e.g., the "hot pursuit" exception, Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), is nevertheless admissible. This approach was taken in three cases involving minimization violations. United States v. King, 335 F. Supp. 523, 543-44 (S.D.Cal. 1971) rev'd. on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); United States v. Sisca, 361 F.Supp. 735, 746-47 (S.D.N.Y. 1973); and United States v. Cox, 462 F.2d 1293 (8th Cir. 1973), cert. denied, 417 U.S. 918 (1974).

The Government's analogy between the search and seizure of tangible items and the monitoring of a conversation overlooks several critical distinctions. Electronic surveillance is a much more intrusive mechanism than is a traditional search and seizure. The latter involves the taking of an item with the resulting invasion of privacy. This invasion, however, can be at least partially corrected by return of the items wrongfully seized. The seizure of a conversation, however, is irrevocable. As the court in United

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82. See, e.g., the Government's Brief in Scott I (Nos. 71-1702 and 71-1703, United States Court of Appeals for the District of Columbia); and the Government's Motion for Summary Reversal in Scott II (Nos. 70-2097 and 70-2098, United States Court of Appeals for the District of Columbia) (by order of March 5, 1975, the Court of Appeals directed that the motion be treated as the Government's Brief).

States v. Focarile, 340 F. Supp. at 1047, noted:

> A conversation once seized can never truly be given back as can a physical object. The right of privacy protected by the Fourth Amendment has been more invaded where a conversation which can never be returned has been seized....

This distinction was also recognized in United States v. King, 335 F. Supp. at 544.

> It is possible that the great delicacy which inheres in a wiretap situation sets it so far apart from other types of searches and seizures that error as to the conduct of a part of the surveillance renders the entire interception invalid.

Moreover, in a typical search, the authorities do not seize "innocent" items. Whether the executing officers stay within the particulars of a warrant or not, only inculpatory items are taken. The same cannot be said of electronic surveillance. Indeed, at its core, a wiretap constitutes a complete survey and a total intrusion into the target individual's life. Whereas a typical search warrant specifically defines the area to be searched and the items to be seized, a wiretap order, by its very nature, permits seizure of everything.[83] In fact, the whole point of minimization is to prevent a general inquiry into a person's life and to inject some particularity into an inherently intrusive mechanism. The failure to adhere to the minimization requirement does not go to any single interception; rather it goes to the conduct of the monitoring agents over the entire span of the wiretap. If the agents fail to minimize, then it is the complete life of the wiretap that is infected.

Furthermore, the remedy of exclusion of the improperly seized items, while meaningful in a traditional search case, is no remedy at all in a wiretap case. In the former situation, the exclusion

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83. This is particularly true in view of § 2517(5) which permits the executing agents to receive after-the-fact judicial orders to justify the monitoring and recording of inculpatory conversations unrelated to the purpose of the original wiretap order.

of the improperly seized items punishes the over-reaching law enforcement officer by denying him the use of evidence that tends to establish the defendant's guilt. In the wiretap situation, however, the evidence unlawfully seized is non-inculpatory or, at a minimum, wholly irrelevant to the purpose of the wiretap. Thus, the remedy suggested by the Government is no remedy at all, since it permits the use of inculpatory material while "conceding" that the material gained as a direct result of an unlawful invasion of privacy should be "suppressed". The Government conveniently overlooks the fact that no one would ever seek to introduce the innocent calls; indeed their introduction would be objected to on relevancy grounds. The district court correctly noted that such an approach to exclusion would gut § 2518(5):

> If this Court were to allow the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in Berger and Katz would be illusory. 331 F.Supp. at 248.

C. The Policy Underlying 18 U.S.C. § 2515 Warrants Suppression Of The Entire Intercept.

Daviage urges this Court to suppress the entire wiretap evidence. Such a remedy for a minimization violation does not require any extension of existing exclusionary principles, but does recognize the unique nature of electronic surveillance. Unlike the Government's position, which would permit virtually unlimited surveillance with "suppression" of items totally irrelevant, this remedy is consistent with the legislative mandate of protecting privacy found in Title III.

The legislative history makes abundantly clear the crucial role of the evidentiary sanctions in insuring that the privacy of individuals is respected. After setting out the specific provisions of § 2515, the Senate Committee report states:

> It largely reflects existing law. It applies to suppress evidence directly (Nardone v. United States, 302 U.S. 379 (1937)) or indirectly obtained in violation of this chapter. (Nardone v. United States, 308 U.S. 338 (1939)).

> There is, however, no intention to change the attenuation rule. See Nardone v. United States, 127 F.2d 521 (2d), certiorari denied, 316 U.S. 698 (1942); Wong Sun v. United States, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. See Walder v. United States, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare Schwartz v. Texas, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare Adams v. Maryland, 347 U.S. 179 (1954); Mapp v. Ohio, 367 U.S. 643 (1969). The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications. S. Rep. No. 1097, supra, 96, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185.

An examination of the cases relied on in the committee report confirms that the drafters of § 2515 intended to incorporate into the statute principles generally supportive of the suppression position urged by Daviage. The two Nardone cases are cited for the basic proposition that illegally seized evidence is inadmissible, Nardone v. United States, 302 U.S. 379, (1937), as well as evidence obtained solely by information derived from illegal seizure, Nardone v. United States, 308 U.S. 338 (1939). The "attenuation rule" for which Nardone v. United States, 127 F.2d 521 (2d Cir), cert. denied, 316 U.S. 698 (1942), and Wong Sun v. United States, 371 U.S. 471 (1963), are cited bears solely on the extent to which indirect evidence gained from information received from an illegal search or seizure can be used and is not an issue in the instant case. The report further cites Walder v. United States, 347 U.S. 62 (1954) for the proposition that the scope of suppression called for in § 2515 is not to exceed present limits. Walder permits illegally seized information to be used for impeachment purposes at trial - a proposition clearly irrelevant to the matter now before the Court. Schwartz v. Texas, 344 U.S. 199 (1952), Adams v. Maryland, 347 U.S. 179 (1954), and Mapp v. Ohio, 367 U.S. 643 (1961), are all cited to support wide ranging scope intended for this rule. That is, the

exclusionary principle is to be applied in virtually all kinds of judicial or quasi-judicial proceedings in both state and federal jurisdictions.

In Gelbard v. United States, 408 U.S. 41 (1972), this Court stressed the importance that Congress attributed to the § 2515 statutory sanction.[84] The Court noted that the fundamental policy of Title III was to limit permissible electronic surveillance in a manner designed to afford great protection for privacy. Id. at 50. The Court went on to say that § 2515 is crucial to this protection:

> The unequivocal language of § 2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information....
>
> * * *
>
> Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear. The purpose of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored.... 408 U.S. at 49-51 (footnote omitted).

As well as implementing and protecting the privacy safeguards, § 2515 serves the traditional policies underlying the judicially fashioned exclusionary rule. As originally set forth in Weeks v. United States, 232 U.S. 383 (1914), the judicially established exclusionary rule prohibits the use of otherwise competent evidence when that evidence was seized in violation of the fourth amendment. The purpose of this policy is primarily to deter unlawful police conduct, Mapp v. Ohio, supra, and further, to insure that the courts "do not become partners to illegal conduct ...." Gelbard, 408 U.S. at 51.

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84. The petitioners in Gelbard had refused to answer questions based upon intercepted telephone conversations to which they had been parties until they had received an opportunity to challenge the legality of the wiretap. As a result of the refusal to testify, the petitioners had been cited for civil contempt. The Court held that witnesses were entitled to invoke the prohibition of § 2515 as a defense to contempt charges.

The instant case is one in which suppression of the entire intercept serves the policies underlying § 2515 particularly well. The minimization provision of § 2518(5) would be rendered meaningless if the agents executing a wiretap were permitted to purposely disregard that directive and conduct a wholesale search. Moreover, were the Government to benefit from such wiretapping conduct, there would be no incentive for the monitoring agents ever to abide by the minimization requirement. Any deterrent effect of § 2515 would be neutralized. Finally, permitting the use in court of wiretap evidence seized in flagrant disregard of the wiretap order would constitute judicial approval of such wiretapping methods.

D. The Minimization Requirement Of 18 U.S.C. § 2518(5) Plays A Central Role In Enforcing The Privacy Requirements Of Title III.

Although this Court has not yet construed the minimization provisions of Title III, its decisions interpreting other provisions of that statute strengthen Daviage's contention that minimization is central to the statutory scheme and should be made meaningful through invocation of the remedy of total suppression. Thus, in United States v. Giordano, 416 U.S. 505 (1974), this Court was confronted with an argument similar to the one now urged by the Government. In Giordano, the Government violated § 2516 (1) which required the Attorney General or a specially designated Assistant Attorney General to authorize all wiretaps. Then Attorney General Mitchell had delegated this responsibility to his Executive Assistant. The Government admitted violating § 2516(1) but argued that the violation was only technical and did not require suppression of the interception. This Court held that, in attempting to balance law enforcement needs against the intrusiveness of electronic surveillance, Congress specifically intended only Senior Justice Department officials to have authorization power. Hence, departure from the statutory scheme constituted too great an encroachment on "the Congressional intention to limit the use of intercept procedures...." 416 U.S. at 527. In reaching this decision to suppress the illegally seized wiretap evidence Mr.

Justice White stated:

> We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. Id. at 527.[85]

United States v. Donovan, 429 U.S. 413 (1977) is the Court's most recent statement interpreting Title III's suppression remedy.[86] Building on Giordano, the Court stated that suppression of the entire intercept is appropriate where the Government violates a section of Title III that plays "a 'central role' in the statutory framework." Id. at 434.

Daviage contends that the minimization requirement plays as central a role in the statutory scheme as did the provision discussed in Giordano. It is , in fact, crucial in preventing a wiretap from becoming a general search. In Berger v. New York, supra, this Court struck down a New York electronic surveillance law, in part, because that statute permitted

> a long and continuous (24 hour a day) period [during which] the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. 388 U.S. at 59.

85. Giordano's companion case, United States v. Chavez, 416 U.S. 562 (1974), held that where the proper Justice Department official authorized the intercept, but that official was later misidentified as one without statutory authorization power, the error was not significant enough to warrant suppression. The Court determined that the Chavez violation was merely technical, and not

> every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communication "unlawful." 416 U.S. at 574-75.

86. In Donovan, the Government violated Title III by failing to inform the approving judge of 1) all of the principal targets of the wiretap as required by § 2518(1)(b)(iv); and 2) all people whose conversations were intercepted for the purpose of sending the post-wiretap notice as required by § 2518(8)(d). The Court held that both of these omissions violated Title III, but that the violations were not significant enough to warrant suppression. The Court suggested, however, that had the violations been willful or deliberat a very different result might well have followed. Id. at 436, n. 23. See also United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977).

Recognizing both the particular intrusiveness of electronic surveillance and its potential for extreme invasion of privacy, Congress attempted to limit the extent of permissible wiretapping. Indeed, Congress explicitly sought to make Title III conform to the limits explicated in Berger and Katz. See p.16 n 12 , supra. The minimization provision goes to the core of Title III insofar as it prevents blanket searches or seizures and attempts to implement the particularity requirement of the fourth amendment. See S. Rep. No. 1097, 103, reprinted in 1968 U.S. Code Cong. & Ad. News at 2192. Were it not for the minimization requirement, law enforcement officials would be permitted to conduct twenty-four hour searches and seizures of private conversations. No one would argue that the Government could seek all papers which a person will write for the next thirty days. Such a request would undoubtedly be denied as constituting a general warrant. Camara v. Municipal Court, 387 U.S. 523 (1967). It is, however, even more extreme for the Government to seize all conversations for a future period. Title III attempts to carefully balance the competing interests of efficient law enforcement and preservation of individual privacy. The minimization provision is central in preventing the scales from tipping too far on the side of electronic intrusion at the expense of personal privacy.

E. Failure To Comply With The Minimization Provision Of 18 U.S.C. § 2518(5) Requires Suppression Of The Entire Intercept.

Although minimization issues have been subjected to considerable scrutiny by the courts, few opinions have dealt extensively with the issue of remedy. Perhaps the most detailed discussion of the appropriate remedy for a failure to minimize is found in United States v. Focarile,[87] supra, in which the United States District Court for the District of Maryland analyzed the two

87. Focarile is the district court case which, on appeal, became United States v. Giordano, supra. At the district court level, the issue of improper Justice Department authorization had not yet emerged. Once that issue did appear, however, it pre-empted the minimization issue.

basic kinds of minimization violation. It described a Type I violation as one in which government agents - as in the instant case - consciously disregard the minimization provision. A Type II violation, on the other hand, arises when the agents attempt to minimize but their efforts are unreasonably inadequate. 340 F. Supp. at 1046.[88] The court went on to say, however, that regardless of the type of minimization violation, the appropriate remedy was suppression of the entire intercepted communication, It rested this analysis squarely on the rationale of effective enforcement of the minimization requirement:

> In either type of violation of the minimization requirement, a question necessarily arises as to the extent of the prophyloctic remedies necessary to give the requirement meaning. In this Court's opinion the minimization requirement of § 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial after the interception is a fait accompli. Id.

Daviage urges that this Court adopt the reasoning of Focarile, and rule that either a Type I or Type II violation of the minimization requirement results in the suppression of the entire intercept. Because the minimization provision plays such a significant role in protecting individuals from unreasonably broad electronic surveillance, logic and fairness require giving full effect to that safeguard.

88. The specific facts of Focarile presented the possibility of a Type II violation, i.e. where the agents' efforts at minimization were unreasonably inadequate. The court went on to rule, however, that there was a good faith effort to comply coupled with actual compliance and hence, no violation.

The Focarile position presently represents the minority viewpoint, with most courts agreeing to suppress only when a Type I violation has occurred. Nevertheless, should this Court adopt the majority position, the result in the instant case would be the same - suppression of all the wiretap evidence. The majority position[89] is a two-step process,[90] turning on the same distinction drawn by Focarile. If the violation of the minimization provision in the order of approval is conscious and deliberate, as in the present case, then total suppression of the entire intercept is appropriate. If, however, the violation is one in which the agents attempted to minimize but inadequately implemented those efforts, then suppression is limited to those interceptions beyond the scope of the wiretap order. An examination of several cases which have applied this two-step process in differing factual contexts is instructive.

In United States v. George, 405 F.2d 772 (6th Cir. 1972), the court faced a factual situation nearly identical to the instant one. The monitoring agents were not supplied with a copy of the wiretap order. Without the order or any other special instructions, the protective limitations contained in the order were entirely circumvented and, as a result, the agents intercepted conversations outside the permissible scope of the authorization. The court found that the surveillance had been conducted in "utter disregard of the provisions of the order of the District Court." Id. at 774. In

89. See United States v. Lanza, 349 F.Supp. 929 (M.D.Fla. 1972); United States v. Leta, 332 F. Supp. 1357 (M.D.Pa. 1971), rev'd on other grounds sub nom, United States v. Cerasco, 467 F.2d 647 (3rd Cir. 1973); United States v. King, supra; United States v. Curreri, 363 F. Supp. 430 (D.Md. 1973); United States v. Tortorello, 480 F.2d 764 (2nd Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975); United States v. Principie, 531 F.2d 1132 (2nd Cir. 1976), cert. denied, 430 U.S. 905 (1977); Cf. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1972), aff'd, 503 F.2d 1337 (2nd Cir.), cert. denied, 419 U.S. 1008 (1974).

90. This two-step approach to suppression closely parallels and complements the two-step method of deciding the actual merits of a minimization claim. See supra, at p. 30.

suppressing the entire intercept, the court stated:

> If the agents of the Government are not required to comply with the limitations contained in an order authorizing interception of telephone calls then the purpose of such order would be defeated.... Id. at 775.

In People v. Brenes, 42 N.Y.2d 41, 396 N.Y.S.2d 629 (1977), the Court of Appeals of New York articulated the two-step approach in formulating a remedy for a minimization violation under New York's wiretap law.[91] In Brenes, as in the instant matter, every conversation totalling 743 in all, was recorded over the course of twenty days. There were no advance procedures worked out for minimizing and no attempt to minimize was made. The court declined to state a "blanket" suppression rule, People v. Brenes, supra, at 635, but went on to say that

> a distinction must be drawn between, on the one hand, cases where, as here, the order is executed as if in defiance of the existence of statutory and decisional minimization requirements and, on the other, cases where in retrospect it appears that the minimization efforts have merely fallen short. While an unlimited intrusion requires a remedy as broad as the unlawful act, a limited one may not. Since, in our view, the present case falls within the first category, total suppression was warranted. Id. at 635 (emphasis supplied).[92]

In several other cases where the courts found substantial compliance and therefore did not suppress, they nevertheless made clear that suppression would have been appropriate if lack of good faith had been demonstrated. For example, in United States v. Lanza, 349 F. Supp. 929 (M.D.Fla. 1972) the court found that of the 4,098 calls intercepted, only 1,066 (26%) constituted

91. See supra, at p. 34 n.41.

92. See also People v. Holder, 69 Misc. 2d 863, 331 N.Y.S.2d 557 (Sup. Ct. of Nassau Cty. 1972) holding that failure by the monitoring agents even to attempt "lip service" compliance with the minimization provision requires suppression of the entire intercept.

recorded non-pertinent calls.[93] The court decided that these statistics, combined with the fact that the agents, in fact, made reasonable efforts to minimize, 349 F. Supp. at 932, indicated that there had been no minimization violation. In reaching its decision, the court contrasted the facts in Lanza with those in the instant case:

> The statute does not prohibit the interception of non-pertinent calls; rather it requires the agents to conduct the wiretap so as to minimize such interception. When, as in Scott, this mandate is so blatantly ignored, the proper result is the suppression of the entire intercept. On the other hand, where non-pertinent calls are intercepted despite the agents' effort at minimization, only the unauthorized interceptions should be suppressed. Id. at 932.

See also United States v. Curreri, 363 F.Supp. at 437 ("If the government totally ignores the minimization directive, total suppression may well be in order."); United States v. Turner, 528 F.2d at 156 ("In a case where it is clear that the minimization provision...was disregarded by the Government...total suppression might well be appropriate."); United States v. Leta, 332 F.Supp. at 1360 n.4.[94]

This two-step approach, keying on the good faith of the agents is consistent with cases construing other provisions of Title III. United States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972), dealt with the failure of the monitoring authorities to provide an inventory to the subject of the wiretap, such failure being in

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93. These figures should be contrasted with a finding by the district court in the instant case that indicated that approximately 60% of the intercept was non-pertinent. See United States v. Scott, 331 F. Supp. at 247.

94. The Leta court suggested that bad faith on the part of the Government not only requires complete suppression pursuant to § 2515, but may well require suppression under the judicial exclusionary rule as a constitutional violation:

> However, it may also be that 100% recording will take place without an effort to minimize where possible. In such a violation, 18 U.S.C. § 2518(5) will have been violated, and it would appear that under 18 U.S.C. § 2518(10), as well as the Fourth Amendment, all the seized conversations would have to be excluded from use by the government. Id.

violation of § 2518(8)(d). In Eastman, the judge who approved the tap deliberately ordered that no inventory be provided. In ruling that all of the wiretap evidence must be suppressed, the court of appeals stated:

> The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed. In other words the failure to file the notice or inventory is not mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public. This we cannot countenance. 465 F.2d at 1062.

This Court itself has suggested distinguishing a remedy based upon the good faith of the agents. In United States v. Donovan, 429 U.S. 413 (1977), the Court held that the Government violated Title III. Despite these violations, the court held that suppression was not required. Nonetheless, the Court did suggest that a finding that the government acted in bad faith may well have mandated a different result:

> There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. 429 U.S. at 436 n. 23 (emphasis supplied).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the judgment of the Court of Appeals.

Peter S. Smith
Adrienne E. Volenik
Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201
Counsel for Amicus Curiae

November, 1977

ADDENDUM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
vs.	Criminal No. 1088-70
FRANK R. SCOTT, et al.	
and	
UNITED STATES OF AMERICA	
vs.	Criminal No. 1089-70
BERNIS L. THURMON, et al.	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit, directing this Court to reexamine the minimization issue in the light of James (United States v. James, 494 F.2d 1007 (1974) and for further proceedings consistent with its order of remand. It directed the Court to "...accept the 'call analysis' and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of James and the comments contained therein."

In compliance with the Remand Order of the Court of Appeals this Court held evidentiary hearings

on October 15, 16, 17 and 18. It received into evidence the "call analysis" made by former Assistant U. S. Attorney Phillip Kellogg, the daily reports of the listening agents as compiled by the supervising agent; the reports of the supervising agent to Harold J. Sullivan, the Assistant U. S. Attorney in charge of the investigation, and the periodic reports of Mr. Sullivan to Judge Smith. Oral testimony was given by Special Agent Glennon L. Cooper, who was in charge of the investigation, by Mr. Kellogg, who prepared the "call analysis" and others. The Court also reexamined the entire transcript of the hearings conducted in April, 1971, and heard arguments of counsel.

II.

Based upon the foregoing reexamination this Court finds:

1. That Title 18, Section 2518(5) of the United States Code requires that

> "(E)very order and extension thereof shall contain a provision that the authorization to intercept ... shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter...".

2. That the orders and extension of Judge Smith authorizing the interceptions in this case contained the direction to the agents manning the tap that was required by Title 18, Section 2518(5).

3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.

III.

4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

5. That the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of "business" phone as was used in James.

6. That the monitoring agents made daily reports of all calls intercepted and classified them as to whether they were narcotic related or not narcotic related.

7. That these daily reports and classifications were turned over to Mr. Sullivan and Mr. Sullivan presented the information and classifications contained in these reports to Judge Smith without modification.

8. That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.

IV.

9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize.

10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath that the telephone calls fell into the classifications mentioned in Paragraph 9 above. He also testified that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows:

BY THE COURT:

Q Agent Cooper, at a hearing -- at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A That is correct, Your Honor.

Q And also that there were times when you, yourself, did the listening?

A That's correct.

Q The question I wish to ask you is this, whether at any time during the course of the wiretap -- of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

V.

A Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtain the reception of conversations was in that instance where the line was connected to -- misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A That i. correct, Your Honor.

11. After hearing testimony of Agent Cooper in April, 1971, after the Court had entered an order suppressing the evidence gathered by reason of the admitted failure to even attempt to comply with the Statute and the minimization order, the Assistant U. S. Attorney then in charge of the case made the "call analysis" and filed a motion to reconsider.

12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap." Mr. Kellogg described the "call analysis" as "...purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to <u>infer, or assert that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no[t]</u>

insofar as I understand." Tr. Hearing on Remand, p. 436. (Underscoring supplied).

VI.

12. The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.

13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.

14. During the period of the intercepts there were conversations between persons at the Jenkins intercept and others at the Linnean Avenue intercepts. On occasion these communications revealed information and set in motion other conduct and types of surveillance that would not otherwise have been known or undertaken by the investigators.

CONCLUSIONS OF LAW AND ORDER

1. The Statute in this case imposes an absolute ban on electronic surveillance except under circumstances authorized by specific procedures which are not mere technical steps. United States v. Giordano, 469 F.2d 522, affirmed, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (May 13, 1974).

2. Title 18, Section 2518(10)(a)(iii) provides for the suppression of "...the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that -- ...that the interception was not made in conformity with the order of authorization or approval."

VII.

3. The "call analysis" in this case is an after-the-fact non-validated presentation of counsel for the Government and does not and was not intended to establish that the monitoring agents complied with the minimization statute and order.

4. The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of a search is not to be determined by what is found. Byars v. United States, 273 U.S. 28, 29; United States v. Di Re, 332 U.S. 581. While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the Statute and order of the Court. Failure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. Sabbath v. United States, 391 U.S. 585.

5. Inasmuch as the conduct of the monitoring agents was unreasonable the intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, including communications between the Jenkins' telephone and the two Lee telephones and all surveillance and conduct emanating from said communications should be and they hereby are suppressed.

VIII.

Joseph C. Waddy
United States District Judge

Date: November 12, 1974